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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE

SULLIVAN & CROMWELL

Of Counsel

March 14, 1989

Question Presented

Section 455(b) of the Judicial Code requires federal judges to disqualify themselves in specified circumstances that may affect their impartiality, and Section 455(e) provides that such disqualification cannot be waived. In the present case, a federal district judge, after disclosing the existence of a family financial interest requiring disqualification under Section 455(b), erroneously declined to step down and then proceeded to conduct a nonjury trial and to enter interlocutory orders of crucial importance. The question presented is whether, on motion made prior to final judgment, those orders must be vacated.

Rule 28.1 Statement

The subsidiaries and affiliates of petitioner Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

City Photo Limited
Consumer Developments Ltd.
Dainichiseika-Sterling Co. Ltd.
Inrock Chemical Co., Ltd.
K.K. Big Color Service
K.K. Eiko Photo
K.K. Nihonbashi Pro Color
K.K. Tokyo Color Chiba Lab.
K.K. Tokyo Color Shizuoka Lab.
K.K. Yokohama Lab.
Kasei Verbatim Kabushiki Kaisha
Kodak Japan Ltd. (formerly Kodak Nagase K.K.)
Kodak Nagase Medical K.K.
Mackwoods-Winthrop Ltd.
Miller Bros. Hall & Company Limited
P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Quick Processing Industries (UK) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug Korea Ltd.
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Stuart Photo Services Limited
Taylors Developing & Printing Works Limited
Verbatim Comercial Ltda.

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner Eastman Kodak Company ("Kodak") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered February 17, 1989.

Opinions Below

The opinion of the court of appeals [A1-14] is not yet reported. The district court's oral statement of October 5, 1981 [B1-2], its memorandum of June 21, 1988 [C1-2] and its order and oral opinion of August 11, 1988 [D1-8] are unreported.

The district court's opinion with respect to certain liability issues is reported at 641 F. Supp. 828 (D. Mass. 1985), and the court of appeals' opinion affirming as to those issues is reported at 789 F.2d 1556 (Fed. Cir. 1986).

Jurisdiction

The judgment of the court of appeals [E1] was dated and entered February 17, 1989. No rehearing was sought. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statute Involved

Section 455 of the Judicial Code (28 U.S.C. § 455) provides in pertinent part as follows:

> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> "(b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> "(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * *
>
> "(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding . . . .
>
> * * *
>
> "(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> * * *
>
> "(2) the degree of relationship is calculated according to the civil law system . . . .
>
> * * *

> "(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

Section 455 in its entirety is set forth in the appendix to this petition [F1-3].

Statement of the Case

Respondent Polaroid Corporation ("Polaroid") commenced this action in April 1976 alleging that Kodak had infringed certain Polaroid patents relating to instant photography and demanding unspecified damages, an injunction and other relief.[1] Kodak denied infringement and counterclaimed for declaratory relief with respect to these and various related Polaroid patents.

It was obvious from the outset that this was a high-stakes lawsuit. If Polaroid were to prevail, Kodak could well be forced out of the instant-photography business altogether, as ultimately it was. Discontinuing that business under the gun of an injunction would not only deprive Kodak of all future profits from that business but require it to recall products and to write off plant and equipment at a cost of hundreds of millions of dollars. Kodak thus stood to suffer serious financial losses quite apart from any damages that it might be required to pay Polaroid. In papers filed in December 1987, Polaroid claimed damages of some $12 billion—more than Kodak's net worth.

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[1] Polaroid brought this action in the United States District Court for the District of Massachusetts, where its principal place of business is located, invoking that court's jurisdiction under 28 U.S.C. § 1338(a).

On October 5, 1981, trial began before District Judge Rya W. Zobel, sitting without a jury, with respect to the validity, enforceability and infringement of certain of the disputed patents. All other issues, including the validity and infringement of other disputed patents, damages and other forms of relief, were reserved for later determination.

Moments before trial began, Judge Zobel made the following announcement from the bench:

> "Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not find this as disqualifying and at this point will proceed to hear the case" [B2].[2]

Without saying anything further on the subject, and without inviting comment by counsel, Judge Zobel directed that the trial commence [B2].

On October 11, 1985, Judge Zobel entered an interlocutory order setting forth her conclusion that several Polaroid patents were valid and infringed and enjoining Kodak from further infringement. The order expressly reserved all issues of damages, willfulness, costs and attorneys' fees for later determination.[3] On Kodak's appeal

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[2] It is undisputed that Judge Zobel's mother-in-law was "a person within the third degree of relationship" to Judge Zobel's husband within the meaning of 28 U.S.C. § 455(b)(5). Polaroid's claims for damages, which it later quantified at some $12 billion, translate into approximately $74,000 for the 1,000 shares of Kodak stock held by Judge Zobel's mother-in-law on October 4, 1981, the day Judge Zobel became aware of that interest. Those shares then had a market value of about $66,500.

[3] Although styled a "judgment" pursuant to F. R. Civ. P. 54(b), Judge Zobel's order of October 11, 1985 was addressed solely to

(footnote continued on following page)

pursuant to 28 U.S.C. § 1292(c), the court of appeals affirmed on the ground that Judge Zobel's "controlling fact findings" were not "clearly erroneous" and that she did not commit "reversible error." 789 F.2d 1556, 1558-59 (Fed. Cir. 1986). This Court denied certiorari. 479 U.S. 850 (1986). As a direct result of Judge Zobel's injunction, Kodak forthwith abandoned the instant-photography business.

On May 9, 1988, during a conference in chambers with respect to the remaining issues in the case, Judge Zobel informed counsel that her mother-in-law had recently died leaving an estate containing Kodak stock, that her husband was named an executor of the estate and was a residuary beneficiary, and that she herself had received a specific bequest. Kodak's stock ownership records establish that Judge Zobel's mother-in-law was, at the time of her death, the owner of 2,250 shares of Kodak stock having a market value of approximately $100,000. Judge Zobel scheduled a further conference for July 6, 1988 to discuss whether under these circumstances her disqualification from further participation in the case was required or might be waived or cured.[4]

On June 15, 1988, Kodak moved to disqualify Judge Zobel from further participation in the case pursuant to

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(footnote continued from preceding page)

the "issues decided"; it did not fully adjudicate any claim for relief—it expressly left open all issues relating to damages, for example. The order was therefore not a final judgment as a matter of law. *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 7-10 (1980); *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742-44 (1976).

[4] In 1986, following the court of appeals' affirmance of Judge Zobel's 1985 injunction, Kodak had retained new lead counsel who, until May 9, 1988, were unaware that Judge Zobel's mother-in-law had been a Kodak stockholder. Neither Judge Zobel nor counsel for either party had referred to that ownership at any time between October 5, 1981, when Judge Zobel ruled that it was "not . . . disqualifying," and the May 9, 1988 conference.

28 U.S.C. § 455 and also to vacate all orders that she had entered after October 4, 1981, the date on which she learned that her mother-in-law owned Kodak stock [D1]. On June 21, 1988, without vacating those orders, Judge Zobel recused herself [C1-2], and the case was reassigned to Judge A. David Mazzone.

On August 11, 1988, Judge Mazzone refused to vacate any of Judge Zobel's orders [D1], citing three reasons. First, although recognizing that Judge Zobel "was able to determine the case in such a way that [Kodak] stockholders would have been affected" [D6], Judge Mazzone could not say that Judge Zobel was incorrect in refusing to disqualify herself in October 1981 because of "the uncertainty of the outcome" of the action and because the 1,000 shares of Kodak stock owned by Judge Zobel's mother-in-law were "insubstantial and insignificant in amount" [D7]. Second, he regarded F. R. Civ. P. 60(b) as applicable [D7] notwithstanding the absence of a final judgment. And third, he believed that reconsideration of Judge Zobel's orders would not be "fair" or "equitable" [D7].

On Kodak's interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and (c)(1), the court of appeals affirmed solely on the third of these grounds, expressly stating that it neither agreed nor disagreed with the first two grounds [A6 n.7] and that for present purposes it was "assuming" that Judge Zobel should have disqualified herself in 1981 [A11]. Saying that the issue was whether Judge Mazzone had "abused [his] discretion" [A5], the court said that "whether Judge Zobel should have disqualified herself in 1981 is irrelevant" [A7] and that the question for consideration "is one of fundamental fairness" [A8]. "The test to be applied" [A11], the court concluded, is that provided

in *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988).

With virtually no discussion, the court brushed aside the fact that *Liljeberg* involved a final judgment that could be vacated only under Rule 60(b), whereas the present case has not yet proceeded to final judgment; the court merely said that the difference between a final and a nonfinal judgment is a "label" [A13]. The court also deemed it irrelevant that *Liljeberg* involved a Section 455(a) disqualification, which the parties can waive, whereas the present case involves a Section 455(b) disqualification, which is expressly *not* waivable [A12]. *See* 28 U.S.C. § 455(e). Incorrectly stating that *Liljeberg* "made no such distinction" [A12], *see* 108 S. Ct. at 202 n.8, the court below refused to vacate Judge Zobel's orders because Kodak "remained silent" [A10] and displayed "acquiescence" [A11] after she had ruled that she was not disqualified, thus holding that Kodak had in effect waived what Section 455(e) makes nonwaivable.

Reasons for Granting the Writ

The court below has decided an important question relating to the impartiality of federal judges and the administration of justice. In refusing to set aside or reconsider nonfinal orders entered by a judge who had erroneously declined disqualification under the absolute, nonwaivable mandate of 28 U.S.C. § 455(b), the court below has thwarted the statute's salutary purpose, has departed from principles established by this Court and has unjustifiably extended this Court's decision in *Liljeberg* to a case in which there is not yet a final judgment and in which waiver is expressly precluded by statute. The issue raised by that decision merits review by this Court.

I.

In declining to purge interlocutory orders tainted by Judge Zobel's Section 455(b) violation, the court below relied entirely on what it called "equity/fairness considerations" [A9]. The principal statutory goal, however, is not "equity" or "fairness," but "confidence in the impartiality of federal judges." H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 7 (1974).[5] By allowing Judge Zobel's Section 455(b) violation to stand uncorrected, the court below has frustrated that purpose and rendered the statute precatory and toothless.

Worse still, by asserting that the existence of a Section 455(b) violation is somehow "irrelevant" to the validity of orders entered by a judge during—and possibly as a consequence of—that violation, the court below sent an inappropriate message to the federal judiciary: Section 455(b) can be safely disregarded unless one of the parties presses a specific objection. The statute, however, places the responsibility for compliance solely on the judge. *United States* v. *Wolfson,* 558 F.2d 59, 62 n.11 (2d Cir. 1977) ("Section 455 is a self-enforcing provision that is directed towards the judge"). As soon as one of the circumstances enumerated in Section 455(b) comes to his attention, a federal judge is required to step down *sua sponte.* The parties have neither the duty to move for disqualification nor the power to waive it. By focusing on *Kodak* rather than Judge Zobel, the court below improperly re-

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[5] Senator Burdick, Chairman of the Subcommittee on Improvements in Judicial Machinery and sponsor of the 1974 amendments to Section 455, explained that disqualification under Section 455(b)(4) and (5) for "financial interest or kinship within the third degree" had been made expressly nonwaivable because "these are two instances in which the public at large would feel a judge most certainly should disqualify himself." 119 Cong. Rec. 33,030 (1973).

lieved the judge of compliance responsibility and shifted it to the parties.[6]

II.

The court below attached decisive significance to the fact that, after Judge Zobel had revealed her disqualifying interest but declined to step down, Kodak "remained silent," raised no "objection," failed to seek "mandamus" and indicated "acquiescence" [A10-11]. The court held, in effect, that by silence and acquiescence Kodak had waived its right to object to Judge Zobel's violation of Section 455(b). Section 455(e), however, expressly provides that a Section 455(b) violation cannot be waived. It can hardly be supposed that Section 455(e) prohibits waiver by affirmative consent yet allows waiver by silence or "acquiescence."

Congress had good reason for making Section 455(b) disqualification nonwaivable. Litigants are understandably reluctant to suggest the presence of a disqualifying interest on the part of the federal judge presiding over their case, and counsel may fear giving offense to a judge before whom they regularly appear. There is no blinking the reality that a federal judge, having total confidence in his own incorruptibility, may unwittingly coerce a waiver with "a velvet blackjack."[7] By making Section 455(b) disqua-

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[6] Although the court below properly recognized that Section 455 "deals only with action of a judge" and "has nothing to do with actions of counsel" [A6], its decision was based wholly on the latter and ignored the former.

[7] "The Congress accepted the view that waiver 'has a way of becoming a velvet blackjack' and should not be allowed." 13A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3552, at 649 (2d ed. 1984) (quoting Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 Utah L. Rev. 377, 387).

lification nonwaivable, Congress has sought to avert such a possibility. The decision below, by permitting a federal judge's Section 455(b) violation to be rendered nugatory by a party's inaction, has effectively undermined the congressional purpose in declaring a disqualifying interest under Section 455(b) to be nonwaivable.[8]

III.

The decision below conflicts with the established principle that any nonfinal decree rendered by an improperly constituted court must be vacated regardless of the inevitable "unfairness" to the prevailing party. In *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), for example, this Court vacated a decree of the circuit court of appeals on the sole ground that, in violation of statute (the predecessor of 28 U.S.C. § 47), one of the judges sitting on that court was the district judge who had heard the case in the first instance. The fact that the parties had expressly consented to that judge's participation was held irrelevant because "the comprehensive and inflexible character of the prohibition was intended to prevent resort to consent of the party or parties as a means of qualifying a judge to participate in the decision . . . ." 228 U.S. at 650. Without

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[8] This would be an inappropriate case for a waiver theory in any event, for Judge Zobel announced her mother-in-law's stock interest and declined to disqualify herself in a single breath. Thus Kodak "remained silent" only after Judge Zobel had already made her ruling. Under these circumstances, the court of appeals' novel suggestion that Kodak was somehow obligated to voice an instantaneous "objection" and then to seek the extraordinary remedy of mandamus if Judge Zobel refused to change her ruling [A10] has no basis in law or reason. Nor did the court have any factual basis for saying that such action "would have avoided any problem" [A10]; that assertion was sheer speculation.

alluding to "fairness," this Court vacated the decree on the ground that the court that had rendered it "was virtually no court at all, because not organized in conformity to law." *Id.* at 652.[9]

In cases under the due process clause of the fourteenth amendment, this Court has repeatedly vacated judgments rendered by state courts whose members had a disqualifying personal interest in the outcome or otherwise lacked impartiality.[10] In none of these cases did this Court allude to possible "unfairness" to the party prevailing below or suggest that any remedy short of vacating the judgment was available or appropriate.

The lower courts have routinely vacated orders and nonfinal judgments rendered by judges or judicial officers found to be disqualified by statute notwithstanding any "unfairness" to the prevailing party.[11] Vacating an order

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[9] *See also Berger* v. *United States,* 255 U.S. 22, 36 (1921) (upon filing of affidavit of prejudice, "Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment").

[10] *E.g., Aetna Life Ins. Co.* v. *Lavoie,* 475 U.S. 813 (1986); *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955); *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

[11] *E.g., Moody* v. *Simmons,* 858 F.2d 137, 143 (3d Cir. 1988) (orders vacated because "a judge who was obliged to recuse acts outside his jurisdiction"); *United States* v. *Gipson,* 835 F.2d 1323, 1325 (10th Cir.), *cert. denied,* 108 S. Ct. 2038 (1988) (28 U.S.C. § 455(b), being nonwaivable, "creates what is tantamount to a 'jurisdictional' limitation on the authority of a judge to participate in a given case"); *Davis* v. *Xerox,* 811 F.2d 1293, 1296 (9th Cir.), *cert. denied,* 108 S. Ct. 457 (1987) (*dictum*) (where "a judge has sat whom Congress had disqualified from sitting, the disqualified judge's rulings are, on appeal, to be vacated"); *Mixon* v. *United States,* 620 F.2d 486 (5th Cir. 1980) (judgment vacated because magistrate was disqualified under 28 U.S.C. § 455(b)(3) and the proceedings were therefore a "nullity"); *NEC Corp.* v. *United States*

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almost always involves some delay, duplication of effort and "unfairness" to at least one of the parties. Such considerations must yield, however, to the overriding requirement that the exercise of judicial office be restricted to those having statutory power to act. *See Christianson* v. *Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) ("Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction"). Nor does a party have any vested right in interlocutory decisions in its favor, no matter how extended the litigation may have been. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) (after eight years of litigation, including two appeals to the court of appeals, this Court dismissed case on ground that plaintiff lacked "standing").

IV.

There can be no suggestion that Judge Zobel's Section 455(b) violation was harmless error, nor did the court below treat it as such. *Cf. Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1527-28 (11th Cir. 1988). As Judge Mazzone later acknowledged, Judge Zobel "was in a position to determine the case in favor of either [party]" [D6]. She was the trier of fact, and her decision would be subject

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(footnote continued from preceding page)

District Court, 835 F.2d 1546 (9th Cir. 1988) (district judge recused himself and vacated his prior orders); *In re Jafree*, 741 F.2d 133, 137 (7th Cir. 1984) (order of district court executive committee vacated because three of the judges were disqualified under 28 U.S.C. § 455(b)(1)); *In re Washington Public Power Supply System Securities Litigation*, 623 F. Supp. 1466, 1470 (W.D. Wash. 1985), *affirmed*, 823 F.2d 1349 (9th Cir. 1987) (all substantive rulings of disqualified district judge vacated by successor judge). *See also* Wright, Miller & Cooper, *supra*, § 3553, at 656-57.

to only limited appellate review. *See* 789 F.2d at 1558-59 (Judge Zobel's "controlling fact findings" were not "clearly erroneous" and she did not commit "reversible error"). The issues before her were of crucial importance. If she were to decide in Polaroid's favor, Kodak could be forced to make a precipitous exit from the instant-photography business, could incur costs of hundreds of millions of dollars in consumer refunds and asset write-offs, and could be exposed to damages that Polaroid now claims are in the billions. Without a doubt, such a decision could substantially affect the value of Kodak's shares. Judge Zobel made such a decision at a time when she had full knowledge that a member of her immediate family was a Kodak stockholder. Whether she was in fact influenced by that knowledge, unconsciously or otherwise, is an imponderable. But it can hardly be doubted that from the moment she acquired that knowledge, there was *danger* of such influence.[12]

Section 455(b) reflects Congress' concern not only that a judge might be tempted to favor personal or family financial interests, but that awareness of such interests might cause even the most conscientious judge to "lean over backwards to demonstrate [impartiality], which is not also doing justice."[13] Federal judges are regularly called on

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[12] A major problem with the "equity/fairness" test devised by the court below is that whether or not a judge has in fact been influenced by a disqualifying interest is inherently unknowable. Balancing the equities, therefore, will nearly always favor the prevailing party because *actual* influence can rarely be demonstrated—a result inimical to the prophylactic effect Congress intended when it mandated disqualification in specified circumstances capable of objective determination.

[13] *To Broaden and Clarify the Grounds for Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 19 (1974) (remarks of Rep. Cohen).

to assess conflicting and ambiguous evidence, to determine credibility, to apply elusive legal principles and to exercise a vast armory of discretionary powers. If such powers are exercised by a judge with a specific disqualifying interest, no one—probably not even the judge himself—can say for sure that this interest had no influence on his decisions. It was the judgment of Congress that decisions subject to such doubts should not be made at all, even with the parties' consent. Allowing such tainted decisions to stand while they still lack finality invites troublesome questions about the integrity of the federal judiciary.

V.

The court of appeals' reliance on *Liljeberg* v. *Health Services Acquisition Corp., supra,* was erroneous for two fundamental reasons.

First, *Liljeberg* involved a motion under F. R. Civ. P. 60(b) to vacate a judgment that had already become final and that could therefore be reopened only under "extraordinary circumstances." 108 S. Ct. at 2204 (citing *Ackermann* v. *United States,* 340 U.S. 193 (1950)). This Court resolved the clash between a statute mandating recusal and the policy of giving finality to judgments by weighing factors pertinent to relief under Rule 60(b). 108 S. Ct. at 2204. There is no need to weigh such factors in the present case because the orders in question can be vacated without "the reopening of closed litigation." *Id.* at 2203. By viewing the distinction between an interlocutory order and a final judgment as a mere "label" [A13], the court below departed from a basic principle of federal jurisprudence and thereby extended *Liljeberg* far beyond its proper scope.

Second, *Liljeberg* involved a Section 455(a) rather than a Section 455(b) disqualification. As this Court pointed out, there are "important differences" between the two subsections, Section 455(b) being "a somewhat stricter provision" and disqualification being waivable under Section 455(a) but nonwaivable under Section 455(b). 108 S. Ct. at 2202 n.8. The considerations that *Liljeberg* held applicable in a Section 455(a) case are incompatible with Section 455(b)'s "stricter," nonwaivable mandate, which "creates what is tantamount to a 'jurisdictional' limitation on the authority of a judge to participate in a given case." *United States* v. *Gipson*, 835 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988). *See William Cramp & Sons, supra*, 228 U.S. at 652 (participation of judge subject to nonwaivable disqualification renders court "virtually no court at all, because not organized in conformity to law").

Far from supporting the decision below, *Liljeberg* exposes its error. The considerations that this Court found sufficient even to warrant the reopening of a final judgment in a Section 455(a) case—"the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process," 108 S. Ct. at 2204—*a fortiori* compel vacatur of nonfinal orders entered by a judge having a specific disqualifying interest under Section 455(b).

Vacating Judge Zobel's orders for reconsideration by a disinterested judge might cause inconvenience but surely not "injustice": Polaroid has no vested right to interlocutory decisions in its favor; both parties have a right to have this case decided by a judge who is not disqualified by statute; and Polaroid, no less than Kodak, is chargeable

with silence and acquiescence in the face of Judge Zobel's Section 455(b) violation. By upholding nonfinal decisions made by a judge disqualified under the financial-interest provisions of Section 455(b) and by shifting compliance responsibility from the judge to the parties, the court below has brought the "velvet blackjack" back into the courtroom in contravention of clear congressional intent and thereby created the risk of serious injustice in other cases. And most importantly, by upholding decisions infected by a disqualifying financial interest, the court below has engendered a serious "risk of undermining the public's confidence in the judicial process."

CONCLUSION

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE

SULLIVAN & CROMWELL

Of Counsel

March 14, 1989

APPENDIX A

Opinion of the Court of Appeals, February 17, 1989

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 88-1616

POLAROID CORPORATION,

Plaintiff-Respondent,

v.

EASTMAN KODAK COMPANY,

Defendant-Petitioner.

DECIDED: February 17, 1989

Before MARKEY, *Chief Judge,* NEWMAN and MAYER, *Circuit Judges.*

MARKEY, *Chief Judge.*

Appeal from an order of the United States District Court for the District of Massachusetts (Mazzone, J.), No. 76-1634, denying Eastman Kodak Company's (Kodak) motion to "vacate all orders entered by Judge Zobel in this action from October 4, 1981 to date." [1] We affirm.

BACKGROUND

On 26 April 1976, Polaroid Corporation (Polaroid) sued Kodak for infringement of ten Polaroid patents relat-

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[1] At Kodak's request, the district court certified its order for immediate appeal. *See* 28 U.S.C. §§ 1292(c)(1), 1292(b). By order dated 12 September 1988, this court granted Kodak's petition for permission to appeal.

ing to its integral instant camera and film system.[2] On 6 October 1981, after extensive pleading, counterpleading, and discovery, trial commenced on liability issues relating to those ten patents. At the very outset, Judge Zobel announced:

> Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not find this as disqualifying and at this point will proceed to hear the case.

On 11 October 1985, the court issued what it called a final judgment on the claims tried. Both parties sought and received certification under Fed. R. Civ. P. 54(b) that there was no "just reason for delay with respect to the entry of a judgment on these ten patents." In its appeal from that judgment, Kodak listed six errors and proferred eighteen arguments in an attempt to show that the court's findings and conclusions were "fatally flawed by systemic legal errors." 789 F.2d at 1559.

After this court affirmed the judgment and the Supreme Court denied certiorari, the case returned to the district court for assessment of damages on the claims decided and for trial on the remaining claims. Judge Zobel presided over another two years of discovery on damages and conducted ten pretrial conferences.

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[2] A full explanation of those patents can be found in the district court's memorandum decision on the liability issues. 228 USPQ 305 (D. Mass. 1985), *aff'd*, 789 F.2d 1556, 229 USPQ 561 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 850.

On 9 May 1988, Judge Zobel held another pretrial conference. At that time she informed counsel that her mother-in-law had died, that she could not continue to preside over the case, and that she was *sua sponte* disqualifying herself because she was a legatee and her husband was executor of the estate.

Counsel for both sides expressed a desire to waive any objection to her participation. Judge Zobel nonetheless stated that disqualification was mandatory and unwaivable. At the request of counsel, however, she agreed to delay her formal disqualification while counsel conducted research for support of their desire that she participate. She took no action in the case after 9 May 1988.

Kodak reversed its earlier position that it could waive her disqualification. Instead of merely informing Judge Zobel of that change and allowing her announced disqualification to be formalized, Kodak filed on 15 June 1988 an unnecessary motion requesting her disqualification.[3] Thus for the *first* time, six and one-half years after Judge Zobel disclosed on the record her mother-in-law's interest and stated her determination that it was not disqualifying, Kodak saw what it hoped would be a basis for her disqualification. Seizing on that basis, Kodak moved at the same time that Judge Zobel vacate all orders she had entered after 4 October 1981, arguing that her participation after that date contravened 28 U.S.C. § 455(b)(5)(iii) and that her disqualification could not be waived. *See* 28 U.S.C. § 455(e).

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[3] Exemplifying the adage that "no good deed ever goes unpunished," Kodak's brief leads the reader uninformed of the record to believe Judge Zobel disqualified herself only in response to Kodak's motion.

Court of Appeals Opinion

On 21 June 1988, Judge Zobel disqualified herself *nunc pro tunc* effective 9 May 1988. She did not rule on either of Kodak's motions. The case was reassigned to Judge Mazzone.

On 11 August 1988, Judge Mazzone heard argument on Kodak's motion to vacate the orders and denied the motion.[4] Judge Mazzone stated in his opinion from the bench:

> While [Judge Zobel] was in a position to determine the case in favor of either [party], or [though] she was able to determine the case in such a way that . . . stockholders in either company would have been affected, she said she did not believe that to be so. . . . Perhaps it was the amount of stock which is insubstantial and insignificant in amount in comparison to the outstanding stock,[5] or [perhaps it was] the uncertainty of the outcome. . . .
>
> . . . [S]he said she did not believe [her mother-in-law's stock in Kodak was] a disqualifying reason. And I don't think that she was incorrect.

Judge Mazzone also said that "[a] modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to controvert that." The Schwartz affidavit indicated that "instant photography accounted for 1.3 to 5.1% of Kodak's total sales in the years 1976 to 1985."

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[4] Appropriately, Judge Mazzone "marveled" at the work Judge Zobel did in the liability phase of the case. This court's earlier opinion expressed a similar sentiment. 789 F.2d at 1557, 229 USPQ at 562.

[5] The record does not reveal the total number of outstanding shares of Kodak stock in 1981. At oral argument, however, counsel for Kodak estimated the number at 162.5 million.

Further, Judge Mazzone noted that: (1) Kodak had been aware of the mother-in-law's interest for six and one-half years, through trial, appeal, and subsequent proceeding, and had never suggested that her participation violated section 455 (indicating that "Kodak had agreed" with Judge Zobel's conclusion); (2) "[w]itnesses have aged [and] memories have faded;" (3) liability was "tried long ago in a long complex exhausting effort by all parties" and the judgment on liability was appealed from and affirmed; and (4) "years and years have gone by." In light of those factors, and citing the Supreme Court's recent guidance in *Liljeberg* v. *Health Services Acquisition Corporation*, 108 S. Ct. 2194, 2203-2204 (1988), Judge Mazzone concluded that:

> [U]nder these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.

Finally, Judge Mazzone stated that "I believe Rule 60(b) applies, and Eastman Kodak is barred from obtaining a vacation of these orders. . . ."

ISSUE

Whether the district court abused its discretion in denying Kodak's motion to vacate Judge Zobel's orders.[6]

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[6] Focusing on Judge Zobel's 1981 determination that disqualification was not required, Kodak argues that the question is one of statutory interpretation and that the statute provides for no discretion in making that determination. As set forth in text, the appeal is from Judge Mazzone's denial of Kodak's motion to vacate, not from Judge Zobel's determination of non-disqualification.

OPINION

Kodak's appeal is from Judge Mazzone's denial of its motion to vacate Judge Zobel's previous orders. That denial rested on three grounds: (1) Judge Zobel correctly determined that her mother-in-law's interest was not disqualifying; (2) the motion is barred because Judge Zobel's orders were "final" and not within Rule 60(b); and (3) to vacate Judge Zobel's orders now would be inequitable and unfair. Because we find the last fully adequate to reflect the absence of abuse of discretion by Judge Mazzone, we need not, and for that reason alone do not, address grounds (1) and (2).[7]

Vigorously and strenuously, Polaroid argues for and Kodak argues against a "timeliness requirement" applicable to 28 U.S.C. section 455(b). Both arguments are analytically flawed. Application of a "timeliness" requirement requires a fixed point or bench mark from which the timeliness or untimeliness of an action can be measured (*e.g.* 10 days after event *X*; before event *Y*). There is no such provision anywhere in section 455. Nor could there be. The statute deals only with action of a judge. It has nothing to do with actions of counsel. Actions to disqualify a judge are provided for in 28 U.S.C. § 144,[8] which does contain the

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[7] That we do not unduly lengthen this opinion with an unnecessary discussion of grounds (1) and (2) cannot, of course, be viewed as indicating either disagreement or agreement therewith. We note, however, that our decision here, where Judge Zobel made her § 455 determination on the record before trial, cannot encourage judges to treat lightly the thrust of § 455.

[8] 28 U.S.C. § 144 reads:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge

(footnote continued on following page)

required bench mark (10 days before the beginning of term or good cause if later).

Kodak argues the present appeal as though it had been filed in 1981 to challenge Judge Zobel's determination of non-disqualification. Kodak did not seek to disqualify Judge Zobel under § 144.[9] But whether Judge Zobel should have disqualified herself in 1981 is irrelevant. Judge Zobel is now disqualified, Judge Mazzone is presiding, and, as above indicated, the present appeal is solely from Judge Mazzone's denial of Kodak's motion to vacate all of Judge Zobel's orders issued since 1981. Though Judge Mazzone referred to the passage of six and one-half years, he did not simply dismiss Kodak's motion as "untimely." On the

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(footnote continued from preceding page)

> before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[9] Section 144 deals with an affidavit to disqualify a judge for bias or prejudice. There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or prejudiced, or for any reason failed to conduct a fair trial. Because 455(b) may be viewed as presuming bias or prejudice when any of its listed circumstances are present, it is arguable that the timeliness provisions of § 144 should apply to efforts to disqualify based on those circumstances. As indicated in the text, we do not here deal with an effort to disqualify, or with the timeliness thereof, but merely note the tendency to refer to § 144 in some of the cases dealing with § 455. *See, e.g., United States* v. *Conforte,* 624 F.2d 869, 879 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980).

contrary, he fully considered the motion and set forth his reasons for denying it.

Thus the question before us is neither the correctness nor incorrectness of Judge Zobel's determination of non-disqualification, nor the mere timeliness or untimeliness of Kodak's raising that question as support for its motion to vacate; the question before us, simply stated, is one of fundamental fairness. A motion to vacate an order of a Judge alleged to have violated § 455(b) necessarily occurs after the date of the alleged violation. There being no statute or rule limiting the time within which such motion may be filed, its filing cannot properly be described as either "timely" or "untimely." The passage of time is merely one factor and events preceding the motion require equal if not greater consideration. Thus the concept of "timeliness" merges into and is subsumed in the concepts of "equity", "fairness", and "justice." [10]

We recognize, as we must, that courts have spoken in terms of a "timeliness requirement" in cases like the present. Analysis reveals, however, that efforts to undo the work of judges allegedly disqualified have been deemed "untimely" for having been initiated at a wide variety of "times." *See, e.g., Kelley* v. *U.S.*, 712 F.2d 884, 887-88 (1st Cir. 1983) (three months after party learned of basis for disqualification); *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980) (before judgment, but after seven and one-half years of pre-trial and trial effort);

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[10] There is no rule governing the time within which a motion may be brought to vacate an order issued by an allegedly disqualified judge, yet the major source of the Rules remains available and is applied here. "The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than the common law." Weinstein, *The Ghost of Process Past*, 54 Brooklyn L. Rev. 1, 4 (1988).

United States v. *Conforte*, 624 F.2d at 879 (learned facts pretrial, made motion post-trial).

The refusal of courts to "start over" has rested not on the mere passage of time, but on the events that had occurred and the balancing of equity/fairness considerations in deciding whether to expunge those events from history's pages. In deciding motions to vacate orders issued by an allegedly disqualified judge, the courts have used "untimely" as a synonym for "unfair" when the circumstances, like those present here, are such that a grant of the motion would produce a result inequitable, unjust, and unfair. "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would *otherwise* be unfair to deprive the prevailing party of its judgment." *Liljeberg*, 108 S. Ct. at 2206 (emphasis added).

For example, the First Circuit, whose decisions guide us here,[11] stated in *Kelley* that untimeliness was a sufficient reason to deny Kelley's motion based on reasons for disqualification Kelley had failed to mention for three months while prosecuting three other motions. In *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st. Cir. 1960) the court said one knowing of a ground for disqualification "cannot be permitted to wait and decide he likes subsequent treatment that he receives" and that in preventing abuse "the requirement of timeliness is of fundamental impor-

[11] Because a motion to vacate based on an alleged disqualification of a trial judge is unrelated to patent law, we follow the guidance of the regional circuit in which the district court sits, here the First Circuit. *See Panduit Corp.* v. *All States Plastic Mfg. Co.*, 744 F.2d 1564, 1572-76, 223 USPQ 465, 469-72 (Fed. Cir. 1984); *Atari, Inc.* v. *JS&A Group, Inc.*, 747 F.2d 1422, 1438-40, 223 USPQ 1074, 1086-88 (Fed. Cir. 1984) (in banc).

tance." (Quoted by the district court in *United States* v. *Kelly*, 519 F. Supp. 1029, 1050 (D. Mass. 1981))[12]

The First Circuit is not alone among the circuits imposing a "timeliness requirement" in the 455(b) context. *See e.g. Ogala Sioux Tribe* v. *Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *In re International Business Machines*, 618 F.2d at 932 (2d Cir.); *United States* v. *Conforte*, 624 F.2d at 879 (9th Cir.); *see also Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1164 n3 (5th Cir.), *cert. denied*, 464 U.S. 814 (1982); *but see e.g. United States* v. *Gipson*, 835 F.2d 1323, 1324 (10th Cir.), *cert. denied*, 108 S. Ct. 2038 (1988); *United States* v. *Slay*, 714 F.2d 1093, 1094-95 (11th Cir.), *cert. denied*, 464 U.S. 1050 (1983). If it were necessary to speak of a "timeliness requirement," the circumstances of the present case form a far more compelling basis for imposing such a requirement than any appearing in the cited cases.

Because the conduct of the movant is a factor in the equity/fairness equation, Judge Mazzone noted that for six and one-half years, through trial, appeal, denial of certiorari, and several years of discovery on the damages phase, Kodak knew of Judge Zobel's position and remained silent. Obviously an objection by Kodak in 1981, and a mandamus petition if its objection were overruled, would have avoided any problem. *See* Fed. R. Civ. P. 46. Even after Judge Zobel announced in 1988 that she had become a legatee, that she was disqualifying herself, and that disqualification

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[12] There is no relation between Kelley and Kelly, or between the cited cases bearing those names in their captions. That the courts of the First Circuit consider a "timeliness" factor in criminal trials, when the delay in raising a disqualification question was a matter of months, further confirms the view that it would do so in this civil case, where the delay was six and one-half years.

was not waivable, Kodak objected to her disqualification and requested time to research a basis for that objection. Presuming, mistakenly, that those considerations meant that its motion had been denied only as "untimely", Kodak relies on the obvious and irrelevant in asserting "there is no timeliness requirement under § 455(b)."

Arguing for an immortal disqualification,[13] Kodak would have us disregard all that has happened during the six and one-half ensuing years and all that Judge Mazzone had to say about Kodak's acquiescence, aging of witnesses, fading of memories, and the unfairness of vacating Judge Zobel's orders and requiring Polaroid to start all over. Kodak fails to note a distinction in the fairness quotient of prospective and retrospective remedies. *See Health Services Acquisition Corp.* v. *Liljeberg,* 796 F.2d 796, 801 (5th Cir. 1986, *aff'd,* 108 S. Ct. 2194 (1988); *In re Cement and Concrete Litigation,* 515 F. Supp. 1076 (D. Ariz. 1981) (acknowledging difference between prospective disqualification and vacating past actions), *mandamus denied,* 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of a quorum,* 108 S. Ct. 2194 (1988). The district court's opinion was cited with approval in *Liljeberg,* 108 S. Ct. at 2203 n.9.

Thus assuming, solely for the purposes of this opinion, that Judge Zobel should have disqualified herself in 1981, the Supreme Court has provided the test to be applied, stating in *Liljeberg,* 108 S. Ct. at 2203:

> Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither

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[13] Contrary to Kodak's arguments, Congress did not intend that a violation of § 455 should in itself and automatically deprive the judge of jurisdiction. "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg,* 108 S. Ct. at 2203.

> prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.
>
> . . . We conclude that in determining whether a judgment ~~should~~ be vacated for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Applying the Court's guidance in *Liljeberg* to the facts of this case, the risk of injustice to the parties weighs far more heavily on Polaroid's side of the scales; there is little or no risk of injustice in other cases, the present denial resting on the specific facts of this case; and the public's confidence in the judicial process is less likely to be undermined when its result is adhered to in repose, and would be more likely to be undermined if the law were to countenance a sundering of the result six and one-half years later on grounds other than the merits.[14]

Kodak argues that *Liljeberg* dealt with § 455(a), not 455(b). The argument is meritless, the Supreme Court having made no such distinction in outlining the test to be used in deciding whether to vacate "for violation of § 455." Though the First Circuit has not had occasion to speak

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[14] In *Liljeberg*, the movant first learned of a basis for disqualification ten months after the appeal had been decided, and moved immediately to vacate the judgment under Rule 60(b)(6), which may be contrasted with the conduct of the present movant who was told the facts by the district court at the outset of trial and moved to vacate after six and one-half years of silence and the conduct of the full judicial process.

of the differences between sections 455(a) and 455(b), we are confident it would find persuasive, as would we, the Eleventh Circuit's discussion in *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), in which the court applied *Liljeberg* to 455(b) in the very context involved here. After concluding that differences between sections 455(a) and 455(b) did not "preclude the application of harmless error analysis in the context of a 455(b) violation," [15] the court said:

> We believe that this conclusion is supported by the Supreme Court's *Liljeberg* decision. When the Supreme Court outlined the test for determining whether a judgment should be vacated due to a § 455 violation the Court did not draw any distinctions between § 455(a) and § 455(b). Further, in the sentence immediately preceding its test to be used when evaluating the appropriate remedy for a § 455 violation the Court stated: "Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for *all* § 455 violations."

Id. at 1527-28 (citations omitted) (emphasis in original).

Kodak's argument that *Liljeberg* applies only to motions to vacate final judgments under Fed. R. Civ. P. 60(b)(6) is equally meritless. As recognized in *Parker*, the Court was speaking of the appropriate remedy for a section 455 violation. The governing principles of equity and fairness are not affected by the label attached to that sought to be vacated. *See In re International Business Machines*, 618 F.2d at 932-34 (denied motion made before judgment on merits).

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[15] *See* Fed. R. Civ. P. 61.

CONCLUSION

No basis exists in law, equity or fairness for giving Kodak an additional bite at the apple. It availed itself fully of the judicial process through a fair and complete trial and a full consideration of its arguments on appeal and in its petition for certiorari. It failed to establish invalidity of Polaroid's patents and was found to have infringed those patents. In light of the factors enunciated in *Liljeberg* and the particular facts of this case listed by Judge Mazzone, we agree with his refusal to "find that it is the law that Eastman Kodak obtains a vacation of this case up to this point" and with his view that a grant of Kodak's motion would not produce a "sensible and fair outcome of this case." Accordingly, the denial of Kodak's motion is affirmed.

AFFIRMED.

APPENDIX B

Ruling of the District Court on Disqualification, October 5, 1981

UNITED STATES OF AMERICA

DISTRICT OF MASSACHUSETTS

CA 76-1634-Z ZOBEL, D. J.

POLAROID CORPORATION

v.

EASTMAN KODAK COMPANY

FIRST DAY OF TRIAL

APPEARANCES:

William K. Kerr, Esquire
Fish & Neave
277 Park Avenue, New York, New York
Attorneys for the Plaintiff

Francis T. Carr, Esquire
Kenyon & Kenyon
59 Maiden Lane, New York, New York
Attorneys for the Defendant

Courtroom No. 3
Federal Building
Boston, Massachusetts

October 5, 1981

The Clerk: Polaroid Corporation versus Eastman Kodak Company, Civil Action 76-1634-Z.

B2

Ruling on Disqualification

Mr. Frank: Good morning, your Honor. I would like to introduce and move for the purposes of this case the admission for several of the lawyers from the Kodak team who are sitting in the jury box.

(Whereupon various counsel were introduced sitting behind the bar.)

The Court: Well, they will be admitted. I assume you're going to file the necessary affidavits under the rules.

Mr. Kerr, do you have a similar motion?

Mr. Kerr: Your Honor, I don't have my complete cast of counsel here with me this morning.

So that I can't introduce counsel to you, to the Court this morning. With me at counsel table this morning is my partner, Herbert F. Schwartz, whom you met in the past; my associates, Ronald K. Fierstein and Patricia A. Martone. You will have additional counsel as the case proceeds.

The Court: Mr. Carr, and Mr. Frank, could I please have the names of the two people at counsel table.

(Counsel at defendant's table introduced.)

Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not regard this as disqualifying and at this point will proceed to hear the case.

We were going to begin with impressionistic openings and I will hear Mr. Kerr.

* * *

APPENDIX C

Memorandum of Recusal of the District Court, June 21, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-Z

POLAROID CORPORATION

vs.

EASTMAN KODAK COMPANY

MEMORANDUM

ZOBEL, *D.J.*

This action was filed on April 26, 1976, and assigned to me on March 17, 1980. Trial of the issues of liability was scheduled to begin on October 5, 1981.

The evening of October 4, 1981, the Court learned that her mother-in-law owned one-thousand shares of Eastman Kodak Company stock. The Court so informed all parties before opening statements and the taking of any evidence. Kodak did not then object to the Court's participation. Throughout the seventy-five days of trial, Kodak's silence continued. On September 13, 1985, the Court ruled on the validity and infringement of the nine Polaroid patents in suit. Kodak still remained mute.

On October 11, 1985, the Court enjoined Kodak from infringing seven of Polaroid's patents and denied a stay of the injunction pending appeal. Kodak said nothing about disqualification.

A lengthy appellate process followed: an application to the Court of Appeals for the Federal Circuit for relief from

the denial of a stay; a petition to the United States Supreme Court; an appeal from the judgment; and a petition to the Supreme Court for a *writ of certiorari*, which was denied on October 6, 1986.

At no point did Kodak call the higher courts' attention [to] the possible need for disqualification.

During ten pretrial conferences over twenty-six months with this Court concerning the damages trial, Kodak's silence remained unbroken.

On May 9, 1988, the Court informed counsel that her mother-in-law had died and that the estate included Kodak stock. The Court also explained to counsel that her husband was named executor, and that he was the residuary, and she [is] a specific legatee. The Court announced that she could not continue to preside over the case and would *sua sponte* recuse herself. Counsel for both parties immediately said they would waive any objections to her continued participation. The Court responded that disqualification was mandatory and not waivable. Counsel expressed a desire to have some time for research. The Court, while explicit in her belief that the hunt would be fruitless, acquiesced. To date, neither party has submitted any authority even suggesting the incorrectness of the Court's stated position. Indeed, for the first time since October 5, 1981, Kodak asks [for] recusal.

Because, as a result of my mother-in-law's death, I have a "financial interest in . . . a party to the proceeding. . . ." within the meaning of 28 U.S.C. § 455, I hereby recuse myself *nunc pro tunc* May 9, 1988. The case shall be drawn to another judge in accordance with the normal practice of the Court.

Date: June 21, 1988

RYA W. ZOBEL
District Judge

APPENDIX D

Order and Oral Opinion of the District Court Denying Motion to Vacate Prior Orders, August 11, 1988

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-Z

POLAROID CORPORATION,

Plaintiff,

v.

EASTMAN KODAK COMPANY,

Defendant.

MOTION OF DEFENDANT EASTMAN KODAK COMPANY PURSUANT TO 28 U.S.C. § 455

Defendant Eastman Kodak Company hereby moves pursuant to 28 U.S.C. § 455 for entry of an order (a) recusing the Honorable Rya W. Zobel from further presiding over this action and (b) vacating all orders entered by Judge Zobel in this action from October 4, 1981 to date, including her decision of September 13, 1985, holding certain of Polaroid Corporation's patents valid and infringed by Kodak and her order of October 11, 1985, enjoining Kodak from infringing the Polaroid patents held valid by the September order.

DENIED, for reasons stated at hearing.

A. DAVID MAZZONE
U.S.D.J.
8/11/88

D2

Order and Oral Opinion Denying Motion to Vacate Prior Orders

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 76-1634-MA

POLAROID CORPORATION,

Plaintiff,

vs.

EASTMAN KODAK CO.,

Defendant.

BEFORE:

Honorable A. David Mazzone
United States District Judge

MOTION HEARING

APPEARANCES:

William Cheeseman, Esq., Foley, Hoag & Eliot, One Post Office Square, Boston, Massachusetts 02109, for Polaroid.

Herbert F. Schwartz, Esq., Robert J. Goldman, Kenneth B. Herman, Fish & Neave, 875 Third Avenue, New York New York, for Polaroid.

Robert S. Frank, Jr., Esq., Choate, Hall & Stewart, Exchange Place, 53 State Street, Boston, Massachusetts, for Eastman Kodak.

Richard E. Carlton, Esq., Richard H. Klapper, Esq., James E. Akers, Esq., Sullivan & Cromwell, 125 Broad Street, New York, New York, for Eastman Kodak.

* Corrected for transcription errors by agreement of the parties.

D3

Order and Oral Opinion Denying Motion to Vacate Prior Orders

Laura Kay Shean Walker, Federal Court Reporter
USPO & Courthouse, Boston, Massachusetts

Courtroom 5
August 11, 1988
Federal Courthouse
Boston, Massachusetts
3:30

Computer-aided transcription

* * *

The Court: I'm going to rule on it, because I've given it, over the past month, a lot of thought, and I've read the record I described. I did spend a particularly large amount of time with the decision of Judge Zobel and the Federal Circuit decision. I had two reactions actually. I marveled at the work my esteemed colleague did. And I was immensely gratified that she came to the Court when she did, because, as you know, it was my case before she drew it at random from me.

In furtherance of her position, I looked—I am not sure what I was looking for, counsel. I suppose I was looking for something to step out and hit me in the face as to some clear way that this case here could be managed from this point on. And I could see nothing in that comprehensive, tight decision from Judge Zobel, and what I thought was the affirmance on all scores in the Federal Circuit.

So, we start with the back drop that on October 5th, 1981, Mr. Carlton, the first day of the liability trial, Mr. Frank was there. Judge Zobel told Eastman Kodak that her mother-in-law owned a thousand shares of Eastman Kodak stock, and she said further she did not regard that as disqualifying and proceeded to hear the case. So it's clear that all parties knew before the trial started, and throughout the trial, on and after her ruling in October

1985, on and after 1985 and 1986 to the appellate procedure that her mother-in-law owned that stock. Now, that's all that was said at that time. I don't think also that there is any reasonable dispute over the holding, over the requirement of Section 455 that the judge disqualify herself if she has an interest—and it is defined later—that could be substantially affected by the outcome of the proceedings.

Now, I understand the arguments of both sides, and I looked, and do look, to the latest teaching of the Supreme Court which is *Liljeberg* v. *Health Services Acquisition Corporation.*

Now, Eastman Kodak tells us that disqualification was mandatory. That's no longer in issue because Judge Zobel has disqualified herself *sua sponte,* after being told, incidentally, by counsel that both sides would acquiesce to her continuing to sit on the case. And Eastman Kodak tells me further that there's nothing but vacation of every order that she issued that is possible in this case, because her actions essentially were a nullity after October 1981.

The Polaroid position—predictable—says that Rule 60(b) applies. The 54(b) judgment is the final judgment under the circumstances in which it is issued here, and relief is not available under 60(b) for any reason. The questions *Liljeberg* tells us we should ask are: Would a reasonable or an objective observer have questioned Judge Zobel's impartiality, because it's clear that if there were an interest, as I said earlier, that could be substantially affected by the outcome of the proceedings, disqualification is mandatory. So, would an objective observer have questioned Judge Zobel's impartiality on October 4th, 1981? That question is put to us in light of the Supreme Court's opinion, as they said in *Liljeberg.*

Order and Oral Opinion Denying Motion to Vacate Prior Orders

There is also a second part of that section of the opinion, and that is what the Court says. There is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a Draconian remedy for every violation of Section 455.

So, under those circumstances, I think it appropriate before we answer the first question to consider the circumstances under which this situation arose. Again citing *Liljeberg,* [i]s it appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief would produce injustice in other cases and the risk of undermining the public's confidence in the judicial process. So, they go on, [i]t is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question the judge's impartiality.

They went on to outline four specific questions. The answers to which they then conclude that the violation in that case was neither insubstantial or excusable. So against that teaching, what we have here—it seems to me—is the following: From the Schwartz affidavit and from the record, we know this. Judge Zobel told everybody that her mother-in-law owned this stock on October 4th or 5th, 1981 before the trial started. Kodak neither questioned nor called her attention to any feelings it might have had that her continued presence in the case would be a violation of Section 455.

When the case went to trial, it lasted—I'm told—something like 75, 80 days of testimony. And afterward it concluded, the Court took it under advisement for several years, 1981 to 1985 when the Court's ruling came down after a period of, I guess, four years. During that time, Kodak did not venture a suggestion, did not move for disqualification throughout the appellate process. There was

no suggestion again, especially to the Federal Circuit which the Statute 1295 says, [s]hall have exclusive jurisdiction, the Circuit Court of Appeals for the Federal Circuit, shall have exclusive jurisdiction of an appeal from a final decision of the District Court of the United States, et cetera. It certainly was a forum in which this belated concern could have been raised.

I understand, again from the docket, that since Polaroid has submitted its damage demand, there have been 10 or 12 conferences for the purpose of trying to establish a schedule for the damages trial and throughout that period again Kodak did not say anything until on May 9th when Judge Zobel's mother died—her mother had died earlier than that, but she informed counsel that her mother-in-law had died—and she was then a beneficiary of the estate, and could no longer sit *sua sponte*. Even then I think the record is clear that Mr. Carlton consistently asked or indicated that Eastman Kodak would voluntarily, or waive objections to her continuing in the case. And until I received these papers here, there was never any objection or suggestion by Eastman Kodak to Judge Zobel's presiding over the case up until that point, or that in any way her earlier orders were affected by her ruling.

So, we have here circumstances where a trial judge has spent six and a half years on the case, aware of the fact that her mother-in-law, not her, owned a thousand shares of Eastman Kodak (sic), and whether or not that was such a substantial interest that it required her disqualification in 1981. First, under the objective test, I do not believe she was incorrect. While she was in a position to determine the case in favor of either, or she was able to determine the case in such a way that stockholders would have been affected, stockholders in either company would have been

affected, she said that she did not believe that to be so, and she said so. Perhaps it was the amount of stock which is insubstantial and insignificant in amount in comparison to the outstanding stock, or the uncertainty of the outcome based on the reasonable fact she did not feel that disqualification was necessary.

The case was uncertain. It was a terribly complex case. The parties had spent three years or so preparing it. She was familiar with it. The shares were a minor, insignificant amount. The outcome was uncertain. And she said she did not believe, and she stated so, that this was not a disqualifying reason. And I don't think that was incorrect.

I think Eastman Kodak agreed with her, and so indicated by its failure to take any action to correct her or even to correct her misapprehension as to whether or not it was a substantial interest. If they had so requested, findings would have been made. The record is clear. But under these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.

For six and a half years Eastman Kodak has known Judge Zobel's position. Witnesses have aged; memories have faded. Liability was tried in a long complex exhausting effort by all parties. It was appealed; it was affirmed. Years and years have gone by. A modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to contravert that.

So, for reasons that, one, I believe Rule 60(b) applies, and Eastman Kodak is barred from its obtaining a vacation of these orders, and under 455 as well. Under these cir-

cumstances, it would be Draconian and unjust, extraordinary to require a second trial. So, my ruling is that the motion is denied.

Now, counsel, I will certify the matter immediately, if you want me to, by adding to my order, "with permission to appeal." I don't want the matter to sit around, because I'm going to have to sit with you and arrange a schedule. I don't know if you've been promised a trial date, but I'm prepared to follow what your schedule is as far as the trial is concerned. But I'm not going to get involved in that in meeting with you if you want this matter cleared up by a higher court. So if you want me to, I will certify the matter immediately to the Federal Circuit.

Mr. Carlton: [Counsel for Eastman Kodak Company] Your Honor, we would respectfully request that you so certify it.

The Court: All right. Then I believe in certifying, that this question involves a controlling question of law as to which there is a substantial difference of opinion. Am I right so far? And that an immediate appeal would materially affect the ultimate termination of the litigation. I certify it under 1292(c) to the Federal Circuit Court of Appeals.

All right. That will be my order.

(Recess taken.)

CERTIFICATE

I, Laura Kay Shean Walker, Registered Professional Reporter, do hereby certify that the foregoing transcript, is a true and accurate transcription of my stenographic notes.

LAURA KAY SHEAN WALKER

APPENDIX E

Judgment of the Court of Appeals, February 17, 1989

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

88-1616

POLAROID CORPORATION,

Plaintiff-Appellee,

v.

EASTMAN KODAK COMPANY,

Defendant-Appellant.

JUDGMENT

ON APPEAL from the United States District Court for the District of Massachusetts in CASE NO(S). 76-1634.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

DATED FEB 17 1989

COSTS: Against, Defendant-Appellant.

PRINTING $439.68

TOTAL $439.68

ISSUED AS A MANDATE: March 10, 1989

ENTERED BY ORDER OF THE COURT
Francis X. Gindhart, *Clerk*

APPENDIX F

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a

"financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a manual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

HERBERT F. SCHWARTZ
875 Third Avenue
New York, New York 10022
Telephone: 212-715-0600
Counsel for Respondent

Of Counsel:
GEOFFREY C. HAZARD, JR.
127 Wall Street
New Haven, Connecticut 06511

FISH & NEAVE
875 Third Avenue
New York, New York 10022

April 12, 1989

2SPP

QUESTION PRESENTED

In this patent infringement action in which there was a lengthy liability trial resulting in a Rule 54(b) judgment in 1985 enjoining Kodak (affirmed on appeal with certiorari denied), should this Court review a decision of the Court of Appeals affirming denial of Kodak's June 15, 1988 motion to vacate the Rule 54(b) judgment and all orders entered by the liability trial judge in this action "from October 4, 1981 to date" because at the outset of that trial on October 5, 1981 she announced that she had learned the day before of her mother-in-law's ownership of some stock in Kodak and that "I do not regard this as disqualifying and at this point will proceed to hear the case"?

Neither party made any reference to or took any action with respect to that announcement until Kodak's motion to vacate, made six and one-half years later and near the conclusion of extensive pretrial preparation for the damages trial, now set to begin May 1, 1989.

STATEMENT PURSUANT TO COURT RULE 28.1

Pursuant to Court Rule 28.1, respondent Polaroid Corporation states that it is a corporation of the State of Delaware. It has no parent company, nor any subsidiaries that are not wholly owned. Its affiliates are Pactide Corporation and PB Diagnostic Systems, Inc.

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No. 88-1501

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OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

The position petitioner Eastman Kodak Company ("Kodak") asserts in this case would render all orders of a district judge void ab initio if the judge erred (as the judge in this case did not) in deciding that the interest of a relative could not be substantially affected by the outcome of the litigation. If this position were tenable, it would have been pointless for this Court in *Liljeberg* v. *Health Services Acquisition Corp.*, ___ U.S. ___, 108 S.Ct. 2194 (1988), to make its extended analysis of flexible remedies and the exercise of discretion in granting them.

In the present case, the parties had full knowledge of the allegedly disqualifying circumstance throughout six and one-half years of liability trial, appellate processes, and damages discovery prior to Kodak's motion. The Court of Appeals decision properly rests on the application of this Court's

Liljeberg guidelines to the facts as found in this case. The fairness to Kodak of the prior proceedings, together with the gross injustice to respondent Polaroid Corporation ("Polaroid"), the waste of judicial resources and the loss of public confidence in the judicial process that would result if the motion were granted, militate against granting certiorari here.

STATEMENT OF THE CASE

A. Judge Zobel's Statement On October 5, 1981

In April 1976, Polaroid sued Kodak, which had just entered the instant photography market, for infringement of ten Polaroid patents relating to its integral instant camera and film system. Kodak counterclaimed for a declaratory judgment that various Polaroid patents, including those ten, were invalid, unenforceable and not infringed. After extensive discovery and other pretrial proceedings, trial on the liability issues commenced on October 5, 1981. At the very outset, prior to opening statements, Judge Rya Zobel announced on the record (B2):[1]

> "Before we begin, I should tell you that I have a mother-in-law problem. It is not the sort that Ann Landers would be interested in. But I learned yesterday that my mother-in-law owns a thousand shares of Kodak stock. She has been a stockholder of Kodak for some 50 years. I do not regard this as disqualifying and at this point will proceed to hear the case."[2]

No comment was made by counsel for Kodak or Polaroid and the trial began.

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[1] Throughout this brief, "JA" refers to the joint appendix on the appeal taken below, "P" refers to the petition, and "A", "B", "C", "D", "E" and "F" to the respective sections of the appendix to the petition. Emphasis in quotations is ours throughout, unless otherwise noted.

[2] The local media's reportage on the opening of the liability trial includes a reference to the judge's statement that her mother-in-law owned Kodak stock (JA301, 318). The outcome of that trial, including injunctive relief, received abundant media coverage throughout the nation.

B. The Liability Trial, Rule 54(b) Judgment And Appellate Processes Thereon

The liability trial took 75 days (JA301). On September 13, 1985, Judge Zobel issued a comprehensive memorandum decision holding that Kodak had infringed seven valid and enforceable Polaroid patents and holding against Polaroid on three patents.[3] The memorandum decision discloses the complexity of the technology, of the trial evidence and of the myriad validity and infringement issues. The Court of Appeals for the Federal Circuit, on the liability appeal, complimented Judge Zobel for her analysis and grasp of such a complicated case (789 F.2d at 1557).

Following the memorandum decision, each party submitted a proposed judgment containing the "express determination" required by Rule 54(b), F.R.Civ.P., "that there is no just reason for delay" and the "express direction" required by Rule 54(b) for "the entry of a final judgment as to one or more but fewer than all of the claims" for relief (JA301-02, 327-33). On October 11, 1985, Judge Zobel entered a Rule 54(b) judgment on the liability claims tried, and, at Kodak's request, on another patent previously held invalid on summary judgment, and disposed of Kodak's counterclaim as to the patents adjudicated. The judgment included an injunction against Kodak's continuing to infringe the five valid and enforceable Polaroid patents which had not yet expired. It also stated that the issues of willfulness of infringement, damages, costs and attorney's fees were to be determined in later proceedings (JA270-76). The same day, Judge Zobel issued a Memorandum Of Decision And Order (228 USPQ 305, 342-44; JA302, 335-37) denying Kodak's request to stay the injunction pending appeal of the liability decision.

Kodak appealed from the Rule 54(b) judgment and moved in the Court of Appeals for an order staying the injunction. After full briefing and oral argument on the merits, the Court of Appeals, on January 7, 1986, denied Kodak's

[3] See 641 F.Supp. 828 (D.Mass. 1985), affirmed 789 F.2d 1556 (Fed.Cir. 1986), cert. denied 479 U.S. 850 (1986).

motion for a stay of the injunction.[4] The following day, Justice Powell denied Kodak's further application for a stay (JA302-03, 339). On April 25, 1986, the Court of Appeals issued its detailed opinion unanimously affirming the Rule 54(b) judgment.[5] Kodak's petition for certiorari was denied (JA304, 341).

C. Damages Trial Discovery And Statements By Judge Zobel And Counsel On May 9, 1988

Shortly after entry of the Rule 54(b) judgment, in December 1985, the parties embarked upon an extensive program of discovery in preparation for the damages trial. There had been no previous discovery on damages. Numerous status conferences were held in 1986, 1987 and early 1988 with Judge Zobel. At the March 18, 1988 status conference, she ordered discovery completed by July 29, 1988 and scheduled the damages trial to commence on January 9, 1989 (JA303-07).[6]

At the next pretrial conference, held in chambers on May 9, 1988, Judge Zobel stated that her mother-in-law had died the preceding month, that her mother-in-law's estate included the Kodak stock which she had previously mentioned, that her husband had been named executor of the estate and residuary legatee and that she had received a specific bequest. She informed counsel that because of this recent development, she would disqualify herself from further participation in the case (JA305). In her June 21, 1988 memorandum order recusing herself *nunc pro tunc* May 9, 1988, quoting from 28 U.S.C. § 455(b)(4),[7] Judge Zobel recounted further proceedings at the May 9, 1988 conference (C2):

> "The Court announced that she could not continue to preside over the case and would *sua sponte* recuse herself.

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[4] *Polaroid Corp.* v. *Eastman Kodak Co.*, 833 F.2d 930 (Fed.Cir. 1986).

[5] *Polaroid Corp.* v. *Eastman Kodak Co.*, 789 F.2d 1556 (Fed.Cir. 1986), cert. denied 479 U.S. 850 (1986).

[6] The damages trial has been reset to commence May 1, 1989, before District Judge A. David Mazzone.

[7] As Judge Zobel noted, § 455(b)(4) requires disqualification where a judge or the judge's spouse "has a financial interest in . . . a party to the proceeding . . . " (F1). Section 455(d)(4) defines "financial interest" as

> Counsel for both parties immediately said they would waive any objections to her continued participation. The Court responded that disqualification was mandatory and not waivable. Counsel expressed a desire to have some time for research. The Court, while explicit in her belief that the hunt would be fruitless, acquiesced."

D. Kodak's Motions Of June 15, 1988

Following the May 9, 1988 conference, Kodak reversed the position it expressed to Judge Zobel that she should continue to participate in the case. Kodak did not merely inform Judge Zobel that it now agreed she should recuse herself, allowing her to formalize her announced disqualification. Instead, on June 15, 1988, Kodak filed an "unnecessary motion" (A3) that Judge Zobel be recused from further participation in the action.[8] Kodak's motion to recuse was combined with a motion that there be vacated "all orders entered by Judge Zobel in this action from October 4, 1981 to date, including her decision of

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including "ownership of a legal or equitable interest, however small" (F2). In *Liljeberg*, this Court noted that "§ 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety" (108 S.Ct. at 2202n.8). As Judge Zobel made clear, the 1988 acquisition by her and her husband of interests in her mother-in-law's estate, which included Kodak stock, was the dispositive fact critical to her determination to recuse herself.

As Kodak's own motion recognizes, so long as the Kodak stock was owned by Judge Zobel's mother-in-law, any disqualification was to be determined under § 455(b)(5)(iii). Section 455(b)(5)(iii) does not use the rigid "financial interest" test but rather requires disqualification only if Judge Zobel knew that her mother-in-law had "an interest that could be substantially affected by the outcome of the proceeding" (F1-2), which she stated in October 1981 she did not believe to be the fact.

[8] The Court of Appeals, referring to "the adage that 'no good deed ever goes unpunished' ", chastized Kodak because its brief before that court "leads the reader uninformed of the record to believe Judge Zobel disqualified herself only in response to Kodak's motion" (A3n.3). Kodak, in the Statement of the Case in its present petition (P5-6), again omits any reference to Judge Zobel's statement on May 9, 1988 that she would *sua sponte* recuse herself.

September 13, 1985 . . . and her order of October 11, 1985, enjoining Kodak . . ." (JA291).

In sole support of its motions, Kodak filed an affidavit by one of its counsel, Richard E. Carlton (JA293-95). The affidavit stated that Mr. Carlton's firm, Sullivan & Cromwell, "had primary responsibility for representing Kodak in this litigation since January 1986" (JA293), and that when Judge Zobel at the May 9, 1988 conference referred to the Kodak stock in her mother-in-law's estate and mentioned that this was the stock she had previously advised the parties about, this "was the first time I or my partners in attendance at the conference had heard of this matter" although "Mr. Frank had some recollection of the matter having come up but was unsure of the details" (JA294).[9] Mr. Carlton went on to state that it was Kodak's position not only that the estate's ownership of Kodak stock required Judge Zobel's recusal from further proceedings, but that all orders entered by Judge Zobel since October 4, 1981 must be vacated because: (1) her announcement on October 5, 1981 "that her mother-in-law's ownership of 1,000 shares of Kodak stock did not constitute a disqualifying financial interest was in error under 28 U.S.C. § 455(b)(5)";[10] (2) "the disqualification was not waivable under § 455(e)"; and (3) "in any event, neither party had been given to [sic] opportunity" to waive "nor had done so" (JA295).

At no time prior to its June 15, 1988 motion had Kodak indicated any objection or taken any action questioning Judge

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[9] Robert S. Frank, Jr., of the firm Choate, Hall & Stewart, has been counsel for Kodak in this action from its outset. He has been actively involved in this litigation and invariably present during court proceedings. He was present on the opening day of trial, October 5, 1981, when Judge Zobel made her announcement regarding her mother-in-law's stock (B2). Other counsel for Kodak were also present that day, including in-house counsel, and attorneys from the firm of Kenyon & Kenyon, which was lead counsel for Kodak until Sullivan & Cromwell's appearance (B2). Kenyon & Kenyon continues as counsel of record to this day (JA303-04).

[10] There is no reference to the term "financial interest" in Judge Zobel's October 5, 1981 announcement and, as noted *supra*, pp. 4-5n.7, there is no reference to "financial interest" in § 455(b)(5)(iii). See also *infra*, pp. 19-20n.20.

Zobel's October 5, 1981 decision not to recuse herself (JA305). Judge Zobel understandably stressed this fact in her June 21, 1988 memorandum order.[11]

Judge Zobel did not rule on either of Kodak's motions. After her memorandum order recusing herself, the case was reassigned to Judge A. David Mazzone.

E. Judge Mazzone's Opinion Denying Kodak's Motion To Vacate

On August 11, 1988, after full briefing and submission of affidavit evidence, Judge Mazzone heard argument on Kodak's motion to vacate. In his opinion from the bench (D3-8), in which he "marveled at the work my esteemed colleague did" in trying and deciding the liability case (D3), he denied the motion on three independent grounds:

> (1) he found that Judge Zobel had correctly determined in 1981 that her mother-in-law's ownership of Kodak stock was not disqualifying;
>
> (2) he found that the Rule 54(b) judgment in 1985 was a final judgment within Rule 60(b), whose requirements for setting aside judgments Kodak had failed to meet; and
>
> (3) he found that to grant the motion and require a second liability trial would be inequitable, unfair and

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[11] As summarized by Judge Zobel: when she made her October 5, 1981 announcement, "Kodak did not then object to the Court's participation"; "[t]hroughout the seventy-five days of trial, Kodak's silence continued"; after her September 13, 1985 ruling, "Kodak still remained mute"; upon the issuance of the injunction, "Kodak said nothing about disqualification"; during lengthy appellate processes, "[a]t no point did Kodak call the higher courts' attention [to] the possible need for disqualification"; during ten pretrial conferences over 26 months concerning the damages trial, "Kodak's silence remained unbroken"; upon her announcement after her mother-in-law's death that "she could not continue to preside over the case and would *sua sponte* recuse herself[,] [c]ounsel for both parties immediately said they would waive any objections to her continued participation"; and now, "for the first time since October 5, 1981, Kodak asks [for] recusal" (C1-2).

unwarranted, when the guidelines set forth by this Court in *Liljeberg,* 108 S.Ct. at 2204, for "determining whether a judgment should be vacated for a violation of § 455" were applied to the facts of this case as found by him.

Judge Mazzone granted Kodak's request for certification (JA1) and the Court of Appeals granted Kodak's motion for leave to appeal.

F. The Court Of Appeals Opinion Affirming Denial Of Kodak's Motion To Vacate

On February 17, 1989, the Court of Appeals unanimously affirmed Judge Mazzone (A1-14). The court rejected Kodak's attempt to cast its appeal as directed to whether Judge Zobel had any discretion to make her 1981 determination, and stressed that the issue before the court was whether Judge Mazzone abused his discretion in denying the motion to vacate (A5, 7). It found that because the third basis on which Judge Mazzone had based his decision, i.e., that to vacate Judge Zobel's orders would be inequitable, unfair and unwarranted under *Liljeberg,* "was fully adequate to reflect the absence of abuse of discretion by Judge Mazzone," it need not address Judge Mazzone's other two grounds for denying the motion (A6).[12]

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[12] Notwithstanding that it is inappropriate for the petition to seek review of those other grounds, Kodak's indirect attack on Judge Mazzone's findings with respect to those two grounds with unsupported, incorrect and argumentative assertions in its Statement of the Case warrants a brief response here.

Kodak seeks (P4-5, 13) to exaggerate, out of all proportion, the effect perceivable in 1981 of the outcome of this case upon the Kodak stock owned by Judge Zobel's mother-in-law. Kodak fails to mention, although it was pointed out by the Court of Appeals (A4), that instant photography accounted for only 1.3% to 5.1% of Kodak's total sales in the years 1976 to 1985, that Judge Mazzone found only a "modest amount of Eastman Kodak's revenues" to be involved, and that the 1,000 shares were to be compared to the 162,500,000 shares of Kodak stock outstanding in 1981. Kodak's attempt to assign to the 1,000 shares, as of 1981, a pro rata portion of the treble

The Court of Appeals also rejected as "meritless" arguments by Kodak that *Liljeberg* is irrelevant here because that case "dealt with § 455(a), not 455(b)" and because that case "applies only to motions to vacate final judgments under Fed.R.Civ.P. 60(b)(6)" (A12-13). In addition, it rejected Kodak's arguments that a violation of § 455(b) constituted "an immortal disqualification" (A11) and that the court should "disregard all that has happened during the six and one-half ensuing years and all that Judge Mazzone had to say about Kodak's acquiescence, aging of witnesses, fading of memories, and the unfairness of vacating Judge Zobel's orders and requiring Polaroid to start all over" (A11). The Court of Appeals also pointed out, "There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or

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damages now sought by Polaroid ignores the absence in the pleadings of any specification of the amount of damages, the absence of discovery on damages until 1985 and the absence, until 1987, of any submission to the court or any discussion at any status conference, of the amount of damages sought (JA303-09). Furthermore, in its Annual Report for the year 1985, Kodak reported to its shareholders that if its appeal in the liability case were unsuccessful and a damages trial ensued, "[b]ased on the advice of patent counsel retained to represent it in this case, the company does not believe that it is likely the amount of damages that might result will have a material adverse effect on the financial condition of the company" (JA310, 370), a statement repeated in subsequent annual reports (JA310, 377, 381). Last week, Kodak's chairman, Mr. Colby Chandler, was reported by Reuters Information Services, Inc. to have said that Kodak does not expect the case, whatever the outcome, to have a material effect on the company (see Appendix hereto). Kodak's attempt to use the 1985 injunction retroactively to conjure up prejudicial spectres in 1981 of being "forced out of the instant-photography business altogether" and being required "to recall products and to write off plant and equipment at a cost of hundreds of millions of dollars" (P3) is disingenuous. Kodak, in 1985, was enjoined only from infringing five unexpired Polaroid patents. It was free to use non-infringing alternatives, the inventions of expired Polaroid patents, including those held previously infringed, and any inventions Kodak might itself make. Furthermore, the Kodak 1985 Annual Report states that "[t]he Company's withdrawal from instant photography should not be seen as threatening in financial terms or in the technological sense" (JA310, 369).

Kodak's contention (e.g., P4-5n.3) that the Rule 54(b) judgment was not a final judgment within the meaning of Rule 60(b) ignores the "final judgment" wording of Rule 54(b) itself, and much authority to the contrary. See, e.g., 7 *Moore's Federal Practice* ¶ 60.20, p. 60-172 (2d ed. 1948, revised 1987). The Rule 54(b) judgment here was also final as to Kodak's declaratory judgment counterclaim which was extinguished with respect to the seven patents held valid and infringed.

prejudiced, or for any reason failed to conduct a fair trial" (A7n.9).

After applying to the facts of this case the *Liljeberg* guidelines for "determining whether a judgment should be vacated for a violation of § 455," the Court of Appeals affirmed the denial of Kodak's motion (A12, 14).

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT

Nothing in this case warrants review on certiorari. There are no special or important reasons why this Court should give petitioner another hearing on matters already considered and correctly decided below. The comprehensive Court of Appeals opinion dealt with and rejected essentially the same arguments Kodak presents anew in its petition.

Judge Mazzone's decision and the Court of Appeals affirmance are sensible and fair and not in conflict with any applicable opinion of this Court or with any decision of another Court of Appeals. No constitutional issue is involved.

The decision below correctly interpreted this Court's opinion in *Liljeberg*. It correctly ruled that *Liljeberg's* guidelines for determining whether vacatur is an appropriate remedy for an alleged violation of 28 U.S.C. § 455 were applicable to a motion to vacate under § 455(b), whether made before or after final judgment. That ruling is in accord with other authority. The court below was also correct in its application of those guidelines to the facts as found in this case and in its decision affirming the denial of Kodak's motion. Every consideration of equity, procedural fairness and regularity, and sound judicial administration militates for the result below and against granting certiorari on the facts of this case.

Kodak's arguments in the petition are based on faulty readings of *Liljeberg*, on faulty readings of the opinion below, on faulty readings of § 455, on incorrect assertions as to Congressional intent, on inapposite authority and on unwarranted disregard of dispositive findings below.

ARGUMENT

A. The Court Of Appeals Decision Is Manifestly Correct

1. The Court Of Appeals Correctly Read *Liljeberg's* Guidelines As Being Applicable To Kodak's Motion

The Court of Appeals decision is based essentially on its interpretation of *Liljeberg,* and on its application to the facts here of the controlling guidelines set forth in *Liljeberg.*

Liljeberg involved violations of 28 U.S.C. § 455(a) and § 455(b)(4) which occurred prior to, but which were discovered by movant after, final judgment. This Court, in affirming, held that use of F.R.Civ.P. 60(b)(6), which it said should only be applied in "extraordinary circumstances", was proper to set aside the judgment, under the facts of that case. The plain language of *Liljeberg,* however, makes clear that this Court used the occasion of that opinion for the salutory purpose of instructing the lower federal courts in broad terms, applicable to any violation of any provision of § 455, with respect to guidelines to be used in determining whether a motion to vacate should be granted. This Court, at the outset of Section IV of its opinion,[13] stated:

> *"Although § 455 defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.* In considering whether a remedy is appropriate, we do well to bear in mind that in many cases — and this is such an example — the Court of Appeals is in a

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[13] Immediately preceding Section IV of its *Liljeberg* opinion, this Court stated: "A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges" (108 S.Ct. at 2203, footnote omitted).

> better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration" (108 S.Ct. at 2203).

Shortly thereafter, before discussing the relevant facts, this Court stated:

> "*We conclude that in determining whether a judgment should be vacated for a violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.* We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice." ' [citing authority]" (108 S.Ct. at 2204).

In its discussion of the facts, this Court recognized that, in addition to a § 455(a) violation, there had been a "separate violation" of § 455(b) (108 S.Ct. at 2206).

In *Liljeberg,* although the motion to vacate was made ten months after affirmance by the Court of Appeals, it was made promptly after respondent had learned of the facts giving rise to the statutory violations. This Court, after noting Rule 60(b)(6) was not being used to circumvent the one-year limitation period of Rule 60(b)(1), stated: "Of particular importance, this is not a case involving neglect or lack of due diligence by respondent. Any such neglect is rather chargeable to Judge Collins" (108 S.Ct. at 2204n.11). After noting that the "violation is neither insubstantial nor excusable" and that relief in that case could make judges more careful in other cases, it stated: "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment" (108 S.Ct. at 2206).

The Court of Appeals opinion in the present case,[14] after "assuming, solely for the purposes of this opinion, that Judge Zobel should have disqualified herself in 1981," states that, in *Liljeberg,* "the Supreme Court has provided the test to be applied" on this motion, quoting the portions emphasized in the quotations above (A11-12). The Court of Appeals opinion also refers to a number of other Courts of Appeals opinions consistent with its view of the law as reflected in *Liljeberg:*

> (1) it notes (A13) that *Parker* v. *Connors Steel Co.,* 855 F.2d 1510, 1527-28 (11 Cir. 1988), rehearing denied en banc 864 F.2d 795 (11 Cir. 1988), "[a]fter concluding that differences between sections 455(a) and 455(b) did not 'preclude the application of harmless error analysis in the context of a 455(b) violation,' " also agreed that, in *Liljeberg,* " '[w]hen the Supreme Court outlined the test for determining whether a judgment should be vacated due to a § 455 violation the Court did not draw any distinction between § 455(a) and § 455(b)' ";[15]

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[14] The opinion was written by Chief Judge Markey, former Chairman of The Advisory Committee on Codes of Conduct of the Judicial Conference of the United States, which has for many years advised judges with respect to the proper construction and application of 28 U.S.C. § 455. See, e.g., *In re Cement & Concrete Antitrust Litigation,* 515 F.Supp. 1076, 1082-84 (D.Ariz. 1981), mandamus denied 688 F.2d 1297 (9 Cir. 1982), affirmed for absence of quorum 459 U.S. 1191 (1983).

[15] Besides *Parker,* there is no other reported Court of Appeals opinion interpreting *Liljeberg* on this point. In *Sollenbarger* v. *Mountain States Telephone & Telegraph Co.,* Civil Action No. 87-1485-SC (D.N.M. February 10, 1989), the court recused itself under § 455(b)(4) but refused, in an interlocutory setting, to vacate its prior rulings because to do so after the eight month delay between the judge's disclosure of his stock ownership and defendant's motion to recuse and vacate was not justified under the *Liljeberg* guidelines. The court noted that "movant chose to wait and see how this court would rule before playing its trump card" and added, "This conduct is blameworthy and dilatory and seemingly may implicate" the prohibitions of the model codes of professional conduct and responsibility "to engage in conduct that is prejudicial to the adminstration of justice", and concluded that movant's "attitude leads to a very inefficient use of scarce judicial resources" and that "plaintiffs would be unfairly treated if the prior rulings were vacated".

(2) it refers (A8-11) to several pre-*Liljeberg* opinions of various other Courts of Appeals where equity/fairness considerations, similar to those later articulated in *Liljeberg's* guidelines, were used to deny motions to vacate orders issued by a judge allegedly disqualified in a § 455(b) context; and

(3) it cites (A8, 13) *In re International Business Machines Corp.*, 618 F.2d 923, 932-34 (2 Cir. 1980), as illustrative authority, consistent with *Lilejeberg's* general teachings, that equity/fairness considerations, including waste of judicial resources, are applicable to deny § 455(b) motions made prior to final judgment to vacate interlocutory orders, and notes that "The governing principles of equity and fairness are not affected by the label attached to that sought to be vacated" (A13).[16]

The Court of Appeals was correct in its interpretation of *Liljeberg,* in its ruling that *Liljeberg's* general guidelines for determining motions to vacate were applicable to Kodak's motion, and in its affirmance of the same interpretation and ruling in the District Court (D5).

2. The Court Of Appeals Correctly Applied *Liljeberg's* Guidelines To The Facts Of This Case In Affirming The Denial Of Kodak's Motion

In the District Court, Judge Mazzone made findings on the issue of whether Judge Zobel should have disqualified herself on October 5, 1981. He found that he did not think she was incorrect in concluding there was no violation of the statute,

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[16] Among more recent Court of Appeals opinions to the same effect as *IBM* is *Willner* v. *University of Kansas,* 848 F.2d 1020, 1022-23 (10 Cir. 1988), cert. denied ____ U.S. ____, 109 S.Ct. 797 (1989), in which the petition and brief in opposition discuss *Liljeberg.* In the recent *Sollanberger* District Court opinion, cited *supra,* p. 13n.15, the court stated, "*Liljeberg* provides guidance on the validity of rulings prior to recusal. Although the *Liljeberg* Court's concern was with the validity of a final judgment after the trial court recused, the standard announced should apply to interlocutory orders as well."

and that he thought Kodak, by its silence, had agreed with that view (D6-7). In addition, having previously summarized some of the history of the case (D5-6), Judge Mazzone went on to state that to require a new liability trial now would be unfair, inequitable, "Draconian and unjust, extraordinary" (D8), concluding (D7):

> "[U]nder these circumstances, I cannot find that it is the law that Eastman Kodak obtains a vacation of this case up to this point. I do not think that would be fair, nor do I think it would be equitable to everyone. It simply gives Eastman Kodak another trial and that would not be, in my judgment, the sensible and fair outcome of this case.
>
> "For six and a half years Eastman Kodak has known Judge Zobel's position. Witnesses have aged; memories have faded. Liability was tried in a long complex exhausting effort by all parties. It was appealed; it was affirmed. Years and years have gone by. A modest amount of Eastman Kodak's revenues are involved, I'm informed in the Schwartz affidavit, and I have nothing to contravert that."

In affirming, the Court of Appeals stated (A12):

> "Applying the Court's guidance in *Liljeberg* to the facts of this case, the risk of injustice to the parties weighs far more heavily on Polaroid's side of the scales; there is little or no risk of injustice in other cases, the present denial resting on the specific facts of this case; and the public's confidence in the judicial process is less likely to be undermined when its result is adhered to in repose, and would be more likely to be undermined if the law were to countenance a sundering of the result six and one-half years later on grounds other than the merits."

The Court of Appeals concluded its opinion with the following (A14):

> "No basis exists in law, equity or fairness for giving Kodak an additional bite at the apple. It availed itself

> fully of the judicial process through a fair and complete trial and a full consideration of its arguments on appeal and in its petition for certiorari. It failed to establish invalidity of Polaroid's patents and was found to have infringed those patents. In light of the factors enunciated in *Liljeberg* and the particular facts of this case listed by Judge Mazzone, we agree with his refusal to 'find that it is the law that Eastman Kodak obtains a vacation of this case up to this point' and with his view that a grant of Kodak's motion would not produce a 'sensible and fair outcome of this case.' Accordingly, the denial of Kodak's motion is affirmed."

The Court of Appeals and the District Court were clearly correct in their application of the *Liljeberg* guidelines to the facts of this case and in their denial of Kodak's motion.

To vacate now the Rule 54(b) judgment and all other orders entered by Judge Zobel from October 5, 1981 to May 9, 1988 and to require a new liability trial would be enormously unjust to Polaroid and monstrously wasteful of judicial resources. Vacatur here would constitute a precedent inviting every litigant who might have any basis for arguing disqualification to postpone action to a time in the future best suiting litigation strategy. It would, in this highly publicized case, shake public confidence in the fairness, common sense and integrity of the judicial process and the courts. It would have a demoralizing effect on the entire federal judiciary, whose duties are difficult enough without being sandbagged and without having their hard work negated by parties who, for tactical or other reasons, profess a change of heart regarding disqualification.

B. Petitioner's Arguments Are Manifestly Unsound

Kodak argues that *Liljeberg's* teaching, with respect to guidelines for determining whether a violation of § 455 warrants vacatur, is limited to § 455(a) violations and final judg-

ments.[17] The court below properly rejected those arguments as contradicted by the plain language and sound rationale of *Liljeberg* and by other authority (A12, 13). Kodak's reliance (P14) on *Liljeberg's* reference to the "extraordinary circumstances" needed under Rule 60(b)(6) to grant a motion to reopen "closed litigation" is also misguided. The liability litigation in this case is certainly closed.

To support its unsound argument that the Court of Appeals violated the "no waiver" provision of § 455(e), Kodak misreads both the opinion below and § 455(e) itself. The court below did not, as Kodak would have it (P7), refuse to vacate "*because* Kodak 'remained silent' . . . and displayed 'acquiescence' ", and hold "that Kodak had *in effect waived* what Section 455(e) makes nonwaivable". Kodak is not correct in stating (P9) that the court "attached *decisive* significance to the fact that . . . Kodak 'remained silent,' raised no 'objection,' failed to seek 'mandamus' and indicated 'acquiescence' " and "held, *in effect,* that by silence and acquiescence Kodak *had waived* its right to object to Judge Zobel's violation". The opinion below makes clear that, while "conduct of the movant is a factor in the equity/fairness equation" (A10), the court's affirmance rested on the fairness to Kodak of the prior proceedings and on the injustice to Polaroid, the waste of judicial resources and the adverse impression on the public that would result from granting Kodak's motion. There is no mention in the court's opinion of any "waiver" by Kodak. The motion was not denied on this ground, expressly or implicitly.

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[17] Kodak mischaracterizes (P15) *Liljeberg's* comparison (108 S.Ct. at 2202n.8) between § 455(a) and the "somewhat stricter" § 455(b). As previously noted, *Liljeberg* involved violations of both § 455(a) and § 455(b)(4). The "important differences" noted in *Liljeberg* were not, as Kodak states, between § 455(a) and § 455(b) but "between subsections (a) and (b)(4)," the opinion going on to state (omitted by Kodak) "Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg* did not broadly say, as Kodak states, that disqualification was "waivable under Section 455(a) but nonwaivable under Section 455(b)"; rather, it says that "§ 455(e) specifies that the judge may not accept a waiver" under § 455(b) but "may accept such a waiver" under § 455(a) (108 S.Ct. at 2202n.8).

While narrowing the holding below to alleged "waiver by silence", Kodak improperly seeks to enlarge § 455(e) to prohibit such a holding. Section 455(e) clearly states that the only kind of waiver it prohibits is one which the judge can "accept from the parties"; that is, a waiver which all parties make, expressly, and the judge accepts, affirmatively. Kodak contends that "It can hardly be supposed that Section 455(e) prohibits waiver by affirmative consent yet allows waiver by silence or 'acquiescence' " (P9). Kodak is wrong. Kodak fails to distinguish a waiver from a preclusion based on the injustice and wastefulness which would result if a belated motion to vacate were granted at the request of a party who, treated fairly as the case moved ahead, had remained silent after learning of a § 455 violation. Congress was aware of the distinction and did not foreclose such preclusion.[18] Kodak is not entitled to the retroactive relief it seeks here.

Kodak's arguments (P8-9) that Congress intended a violation of § 455(b) automatically to oust a judge of jurisdiction, and thus to render void all subsequent orders, are incompatible with the statements in *Liljeberg* that § 455 "neither prescribes nor prohibits any particular remedy for a violation of that duty. Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purposes of the legislation" (108 S.Ct. at 2203). Kodak's arguments are also undercut by the finding of the court below that "Contrary to Kodak's arguments, Congress did not intend that a violation of § 455 should in itself and automatically deprive the judge of jurisdiction" (A11n.13). Kodak's petition continues to press Kodak's "no jurisdiction" contention (P10-12, 15). It not only relies on a melange of inapposite cases,[19] but fails to cite, much

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[18] See, e.g., *Delesdernier* v. *Porterie*, 666 F.2d 116, 120-23 (5 Cir. 1982); *To Broaden and Clarify the Grounds For Judicial Disqualification: Hearings on S. 1064 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 93rd Cong., 1st Sess. 84 (1971 and 1973), pp. 17-18, 22, 36-37.

[19] It is not necessary to spell out the respects in which each of the authorities cited by Kodak is distinguishable. However, it should be noted here, as it was not in the petition, that in *Wm. Cramp Sons* v. *Curtiss Turbine Co.*, 228 U.S. 645 (1913), the statute *expressly* mandated that no district

less deal with, *United States* v. *Will,* 449 U.S. 200, 211 (1980), called to Kodak's attention below, in which this Court made the following statement:

> "Section 455 of Title 28 neither expressly nor by implication purports to deal with jurisdiction. On its face § 455 provides for disqualification of individual judges under specified circumstances; it does not affect the jursidiction of a court."

Notwithstanding its contention that *Liljeberg* is inapplicable, Kodak attempts to create sympathy for its position, and to place Judge Zobel's ruling outside the "harmless error" doctrine approved in *Liljeberg.* Ignoring the finding below that "There is no evidence, nor does Kodak suggest, nor could it, that Judge Zobel was biased or prejudiced, or for any reason failed to conduct a fair trial" (A7n.9), Kodak impugns Judge Zobel with unsupported accusations, innuendo and misstatements. For example, Kodak speaks of Judge Zobel's orders being "*tainted*" and "entered . . . possibly *as a consequence of*" her violation (P8; see also P14). By misreading § 455(b)(5)(iii),[20] Kodak attacks the court below for uphold-

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judge should sit in the circuit court of appeals on the same matter heard by that judge below; in *U.S.* v. *Gipson,* 835 F.2d 1323, 1325 (10 Cir. 1988), cert. denied ____ U.S. ____, 108 S.Ct. 2038 (1988), the question was whether a guilty plea could be construed to constitute a waiver of denial of recusal under § 455(b), the court holding it could not be because "*In the context of the issue before us,* we believe § 455(e) creates what is tantamount to a 'jurisdictional' limitation"; and in *Moody* v. *Simmons,* 858 F.2d 137 (3 Cir. 1988), cert. denied ____ U.S. ____, 57 U.S.L.Week 3619 (March 20, 1989), the court held that § 455(b) did not apply and that a judge's *declaration of disqualification* effectively recuses him and renders him without power to enter further orders.

[20] Kodak's use in several places (Pi, 13, 16) of the term "financial interest" in referring to Judge Zobel's alleged violation is misleading. Kodak's motion is based on an alleged violation of § 455(b)(5)(iii), which statute section, unlike § 455(b)(4), does not contain this implacable phrase, but instead speaks merely of "an interest that could be substantially affected by the outcome", a discretionary judgment. This distinction, as well as common sense under the facts here, undercuts Kodak's fanciful implication that Judge Zobel may have made incorrect rulings against Kodak because her awareness in 1981 of the "family *financial interests*" might have caused her

ing decisions "made by a judge disqualified under the *financial-interest* provisions of Section 455(b)" and *"infected* by a disqualifying *financial interest"* (P16).[21]

Kodak also errs in stating that "There can be no suggestion that Judge Zobel's Section 455(b) violation was harmless error, nor did the court below treat it as such" (P12). The court stated that it found "persuasive" *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1527 (11 Cir. 1988), including *Parker's* conclusion "that differences between sections 455(a) and 455(b) did not 'preclude the application of harmless error analysis in the context of a 455(b) violation'" (A13). The court below added in a footnote, "*See* Fed.R.Civ.P. 61" (A13n.5, emphasis by the court), the harmless error rule.

In *Liljeberg*, this Court stated, "the Court of Appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration" (108 S.Ct. at 2203) and, in affirming, noted that the violation in that case was "neither insubstantial nor excusable" (108 S.Ct. at 2206). In the present case there can be no doubt that, as the court below found, even if a violation were to be assumed (and there was none) it would have been not only insubstantial and excusable, but entirely harmless to Kodak. Every consideration of sound judicial administration militates against granting certiorari here.

" 'to lean over backwards to demonstrate [impartiality], which is not also doing justice' " (P13).

[21] Kodak unfairly maligns Judge Zobel, who on both occasions promptly called to the parties' attention possibly disqualifying circumstances, with its illogical and unbridled assertions that the opinion below "sent an inappropriate message to the federal judiciary: Section 455(b) can be safely disregarded unless one of the parties presses a specific objection" (P8), "improperly relieved the judge of compliance responsibility" (P8-9) and "invites troublesome questions about the integrity of the federal judiciary" (P14).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
HERBERT F. SCHWARTZ
875 Third Avenue
New York, New York 10022
Telephone: 212-715-0600

Counsel for Respondent

Of Counsel:
GEOFFREY C. HAZARD, JR.
127 Wall Street
New Haven, Connecticut 06511

FISH & NEAVE
875 Third Avenue
New York, New York 10022

April 12, 1989

APPENDIX

KODAK CHAIRMAN STILL CHALLENGING PATENT RULING

LOS ANGELES, April 6, Reuter—Eastman Kodak Co. (EK) expects to continue to contest a court ruling that it infringed on a patent held by Polaroid Corp. (PRD), Kodak chairman Colby Chandler told a news conference.

Polaroid, in a case filed about 13 years ago, won a liability judgment against Kodak for patent infringement over an instant camera development by Kodak. Damages, however, have yet to be awarded. A separate trial to determine damages is scheduled to start on May 1.

"We still hope for and want an opportunity to continue to argue the merits of our position because we worked as hard and carefully as any company could work to make sure we did not infringe valid patents. And I'm absolutely certain we did not," Chandler said.

Chandler, in comments at a news conference before a speech to a Los Angeles civic group, added, "We're going to pursue actively our position in the case because we believe in defending our actions." In addition to the effect of the ruling on Kodak, Chandler criticiized [sic] the ruling as a step backward in patent law.

"If it is allowed to stand as the first verdict was issued, it changes the interpretation and application of patent law in a very major way," he said. "It moves in the direction from testing the validity of patents by court procedures . . . back to where patents as issued are presumed to be valid."

Such a step would be burdensome to companies wanting to test a patent's validity in order to be able to participate in a particular field, he said.

Despite his concern over the ruling, Chandler noted that Kodak does not expect the case, whatever the outcome, to have a material effect on the company.

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No. 88-1501

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY MEMORANDUM

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE
SULLIVAN & CROMWELL
Of Counsel

April 19, 1989

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Amended Rule 28.1 Statement

The subsidiaries and affiliates of petitioner Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

American Health Cap Assoc LP; Anglia Supercolour Studios Limited; APA Capital Risque II; APA Capital Risque II (A); Cauzin Systems, Inc.; Chinon Industries Inc.; City Photo Limited; Coda; Consumer Developments Ltd.; Cytogen; Dainichiseika-Sterling Co. Ltd.; De Forenede Fotolaboratorier A/S; Enzon; Farvelabben A/S; Fotographics (N.Q.) Pty. Ltd.; Fototec SA; H&Q Life Science Venture; Horsley Keough Ltd, Partnership; IDLC Limited; Immunex; India Photographic Company Limited; Industria Fotografica Interamericana, S.A. de C.V.; Japan/U.S. Ventures Partners; Kamata Pro Photo Y.K.; Kasei Verbatim Kabushiki Kaisha; K.K. Big Color Service; K.K. East West; K.K. Joy; K.K. Qualte; K.K. Soft Lab; K.K. Techni-Color Angel; K.K. Tokyo Color Lab.; Kodak Nagase Medical K.K.; Kodak-Pathe; Laserdrive Ltd.; LK-TEL Video S.A.; Mackwoods-Winthrop Ltd.; Mafano Pty. Ltd.; Microelectronics and Computer Technology Corporation; Miller Bros. Hall & Company Limited; Morgan Stanley Research Ventures L.P.; Neorx Corporation; Nueva Vision S.A.; Ordimat S.A.R.L.; Photo Finishers (Glasgow) Limited; P.T. Sterling Products Indonesia; Qualex; Quick Processing Industries (UK) Limited; Quimica Farmaceutica Platense, Sociedad Anonima Industrial y Comercial; The Roll Film Company Limited; Seaga Pty. Ltd.; Seaga (VIC) Pty. Ltd.; Sopexim SA; Spaceworld A/S; Sterling Products (Ghana) Ltd.; Sterling Products (Nigeria) Ltd.; Sterling Products Pakistan (Private) Ltd.; Sterling Yamanouchi Pharmaceutical Inc.; Sujata Verbatim Limited; Taylors Developing & Printing Works Limited; T.J. Kenyon (Stevenage) Limited; Venture Founders Cap. Ltd. Partners; Verbatim Comercial Ltda.; Verbatim Do Amazonas Industrial Ltda.; Vischrome Pty. Ltd.; Winster Pharmaceuticals Ltd. and Y.K. Yamagata Taigyo Photo.

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Legislative History

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IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1501

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In its Brief in Opposition Polaroid ignores or attempts to paper over the reasons why this case merits review:

1. Polaroid's assertion that the decision below is "not in conflict with any applicable opinion of this Court or with any decision of another Court of Appeals" (Br. in Opp. 10) is wrong on both counts.

The decision below conflicts with, *e.g.*, *William Cramp & Sons* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913) (*see* Pet. 10-11), in which this Court vacated a lower-court decree solely because of the participation, with the parties' express consent, of a judge disqualified by statute. Polaroid does not suggest that *Cramp* is no longer good law and offers no coherent reason why it does not control the present case.

Nor does Polaroid draw any meaningful distinction between this case and the numerous cases in which courts of appeals have vacated orders and judgments rendered by disqualified judges, sometimes after protracted proceedings. *See* Pet. 11-12 & n.11; *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (despite "unfairness" and "expense," judgment entered after 33-day trial reversed because trial judge was disqualified by statute).

2. Polaroid contends that *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), obliterated the fundamental distinction between interlocutory orders and final judgments by subjecting all Section 455 motions to identical "guidelines." This Court's opinion clearly negates such a notion. For example, the Court began its analysis by stating that the issue with respect to remedy was "whether relief is available under Rule 60(b) when [a Section 455(a)] violation is not discovered until after the judgment has become final," *id.* at 2201, and what Polaroid calls the "guidelines" were immediately prefaced by a reference to "Rule 60(b)(6) relief" and to considerations appropriate "in determining whether a judgment should be vacated," *id.* at 2204. In this context, the word "judgment" unmistakably meant *final* judgment, *see* F. R. Civ. P. 54(a), and the "guidelines" were obviously rooted in Rule 60(b).

Given the facts of the *Liljeberg* case, this Court had no occasion to consider the relief available for a Section 455(b) violation when, as here, such relief can be granted without vacating a final judgment.

3. Polaroid makes repeated assertions that *Liljeberg* involved a violation of Section 455(b)(4) as well as of Section 455(a), but it fails to point out that the Section 455(b)(4) violation could not have affected the judgment

because it did not occur until *after* the judgment had been entered. *See* 108 S. Ct. at 2206. It was the Section 455(a) violation alone that tainted the judgment, and undoubtedly for that reason this Court referred to the Section 455(b) violation only in passing.

In the present case it is entirely possible that Judge Zobel's Section 455(b) violation affected her crucial ruling as to the validity and infringement of the Polaroid patents. That violation continued throughout the trial, throughout the period of her deliberations and until long after she filed her ruling. There can be no assurance that the disqualifying circumstance—Judge Zobel's awareness that her ruling could substantially affect the value of her mother-in-law's 1,000 shares of Kodak stock—in fact had no influence on that ruling.[1] Thus Polaroid's insistence that Kodak received a fair trial unblemished by bias or improper influence is at best an unfounded speculation. It is also erroneous as a matter of law, for Congress has decreed that when a judge's close relative has an interest that could be substantially affected by the outcome of the litigation, proof of actual bias is unnecessary; to safeguard against the possibility of bias, and above all to promote public confidence in the federal judiciary, Congress has made recusal mandatory in such circumstances. To wink at a Section 455(b) violation is to undermine this salutary congressional purpose.[2]

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[1] It is of course immaterial whether a judge favors a relative's financial interest or "bend[s] over backward . . . in order to demonstrate impartiality." *In re Drexel Burnham Lambert, Inc.*, CCH Fed. Sec. L. Rep. ¶ 94,198, at 91,734 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing en banc), *petition for cert. filed sub nom. Milken* v. *SEC*, — U.S.L.W. — (U.S. April 5, 1989) (No. 88-1628).

[2] Whether a Section 455(b) violation can ever be disregarded as "harmless error" and, if so, under what circumstances are questions

(footnote continued on following page)

4. Polaroid repeatedly refers to Judge Zobel's interlocutory order of October 11, 1985 as "a Rule 54(b) judgment," but it makes no attempt to show that the order in fact met the requirements of Rule 54(b), and clearly it did not. The order did not dispose of any "liability claims," but only of "issues decided"; and it expressly provided that "the amount of damages" and several other specified "issues" would be determined "in a subsequent trial," which is yet to be held. Polaroid does not try to explain how it can hope to recover $12 billion in damages on the basis of claims that have already been merged into a final judgment. Under the circumstances, it is hardly surprising that even the court below declined to accept Polaroid's argument that the October 11, 1985 order constituted a "Rule 54(b) judgment."

Equally unsupportable is Polaroid's suggestion that Judge Zobel was somehow correct in declining recusal in October 1981. According to Judge Mazzone—Judge Zobel herself made no findings on the recusal issue—"she was able to determine the case in such a way that . . . stockholders in either company would have been affected" (Pet. App. D6-7), and "the outcome was uncertain" (*id.* D7). These findings, which the court of appeals did not disturb, are dispositive of the disqualification issue, for Section 455(b)(5)(iii) required Judge Zobel to recuse herself once she knew that her mother-in-law had "an interest that could be substantially affected by the outcome of the proceeding." By her own acknowledgment, Judge Zobel learned of that interest on October 4, 1981 (Pet. App. B2). A premise of

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(footnote continued from preceding page)

raised in a petition for certiorari presently pending before this Court. *Parker* v. *Connors Steel Co., petition for cert. filed,* 57 U.S.L.W. 3655 (U.S. March 14, 1989) (No. 88-1535). In the present case, however, Judge Zobel's Section 455(b) violation was clearly not harmless. *See* Pet. 12-14.

the decision below was that Judge Zobel was disqualified from that date onward. Polaroid's contrary argument is without merit.

5. At bottom, the flaw in Polaroid's argument lies in its failure to come to grips with the important purpose underlying Section 455(b)—promoting public confidence in the impartiality of federal judges. *See* Pet. 8. Congress has decreed that if a judge presides over a case knowing that the outcome "could" have a substantial effect on a close relative's interest, the public may suspect, rightly or wrongly, that the decision is the product of judicial bias. Strict enforcement of this congressional mandate is essential to preserving public confidence in the federal judicial system. Doing so may exact a price in terms of efficiency and even "fairness" to a particular litigant, but the important societal values inherent in Section 455(b) dictate that this price be paid. *See Potashnick* v. *Port City Construction Co., supra,* 609 F.2d at 1115 ("The unfairness and expense which results from disqualification . . . can be avoided . . . only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned").[3]

The considerations advanced by Polaroid and by the court below are insufficient justification for upholding a decision rendered by a judge disqualified by statute because of a family financial interest in one of the parties. The

[3] A recent amendment to Section 455 has reconfirmed the congressional judgment that efficiency and fairness are insufficient justification for allowing federal judges to preside over cases in which they or their families have a financial interest "that could be substantially affected by the outcome." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4667 (Nov. 19, 1988). *See* H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 68 (1988). The text of this amendment is set forth as an addendum to this memorandum.

appellate courts have frequent occasion to reverse decisions for errors of law, sometimes undoing years of litigation effort as a result. Here the error is of far greater import—to the judicial system and to the public at large—than the errors requiring reversal in the average case.

For these reasons, and for the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE

SULLIVAN & CROMWELL

Of Counsel

April 19, 1989

Addendum

Judicial Improvements and Access to Justice Act, Public Law No. 100-702, § 1007 (102 Stat. 4642, 4667) (November 19, 1988)

Sec. 1007. Judicial Disqualification Amendment.

Section 455 is amended by adding at the end thereof the following:

"(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification."